

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911

No. 95

R. J. BERRYMAN, ASSESSOR; P. B. HAWLEY, TREASURER; W. J. HONEYCUTT, AUDITOR, ET AL., APPELLANTS,

vs.

THE BOARD OF TRUSTEES OF WHITMAN COLLEGE

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF WASHINGTON.

FILED JULY 19, 1911.

(21,759.)

(21,759.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 533.

R. J. BERRYMAN, ASSESSOR; P. B. HAWLEY, TREASURER; W. J. HONEYCUTT, AUDITOR, ET AL., APPELLANTS,

vs.

THE BOARD OF TRUSTEES OF WHITMAN COLLEGE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR
THE EASTERN DISTRICT OF WASHINGTON.

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1 BOARD OF TRUSTEES OF WHITMAN COLLEGE, Complainant
and Appellee,
versus

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer; W. J. HONEY-
cutt, Auditor; J. H. Morrow, George Struthers and J. N. McCaw,
Commissioners, Constituting the Board of Equalization of Walla
Walla County, State of Washington, Defendants and Appellants.

Transcript of the Record on Appeal from the Circuit Court of the
United States for the Eastern District of Washington, Southern
Division.

2 In the Circuit Court of the United States for the Eastern
District of Washington, Southern Division.

Number 250. Equity.

BOARD OF TRUSTEES OF WHITMAN COLLEGE, Complainant and
Appellee,
versus

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer; W. J. HONEY-
cutt, Auditor, and J. H. Morrow, George Struthers, and J. N.
McCaw, Commissioners, Constituting the Board of Equalization of
Walla Walla County, Washington, Defendants and Appellants.

Names and Addresses of Counsel.

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and Appellants.

3 In the Circuit Court of the United States for the Eastern
District of Washington, Southern Division.

No. —.

BOARD OF TRUSTEES OF WHITMAN COLLEGE, Complainant,
vs.

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer; W. J. HONEY-
cutt, Auditor, and J. H. Morrow, George Struthers, and J. N.
McCaw, Commissioners, Constituting the Board of Equalization
of Walla Walla County, Defendants.

Bill of Complaint.

To the Honorable the Judges of the Circuit Court of the United
States for the Eastern District of Washington:

Stephen B. L. Penrose, Nelson G. Blalock, Myron Eells, Levi
Ankeny, Horace P. James, William H. Cowles, Allen H. Reynolds,

Louis F. Anderson and Park Weed Willis, being a body politic and corporate in law by the name and style of the Board of Trustees of Whitman College, bring this Bill against R. J. Berryman, the Assessor, P. B. Hawley, the Treasurer, W. J. Honeycutt, the Auditor, and J. H. Morrow, George Struthers and J. N. McCaw, the commissioners, constituting the Board of Equalization, of Walla Walla County, State of Washington;

And thereupon your orator complains and says:

I.

On the 20th day of December, 1859, Elkanah Walker, Cushing Eells, and others, being desirous of establishing an institution of learning within the then territory of Washington for the higher and better education of both sexes, which said institution would be established, supported and maintained by voluntary contributions, did secure for said purpose a Charter from the said Territory of Washington, and on said day the Legislative Assembly of the Territory of Washington, duly passed an Act entitled

4 "An Act to Establish an Institution of Learning in Walla Walla County," in the words following, to-wit:

"Sec. 1. Be it enacted by the Legislative Assembly of the Territory of Washington that there shall be established in Walla Walla County an institution of learning, for the instruction of persons of both sexes, in science and literature, to be called the 'Whitman Seminary;' and that Elkanah Walker, George H. Atkinson, Elisha S. Tanner, Erastus B. Joslyn, W. A. Tenney, H. H. Spalding, John C. Smith, James Craigie, and Cushing Eells and their successors, are hereby declared to be a body politic and corporate, in law, by the name and style of the President and Trustees of Whitman Seminary.

SEC. 2. That the corporation before named shall have perpetual succession, and power to acquire, possess and hold property, real, personal and mixed, and the same to sell, grant, convey, rent, or otherwise dispose of at pleasure; and they shall have power to contract, and be contracted with, sue and be sued, plead and be impleaded in all courts of justice, both at law and equity; they shall have and use a common seal, with power to alter it at pleasure; and they may exercise all the powers and enjoy all the privileges of other institutions of learning in this Territory.

SEC. 3. That the corporate concerns of said Whitman Seminary shall be managed by themselves as a board, consisting of the nine members, and that a majority of the members of the Board shall constitute a quorum for the transaction of business; said Trustees shall elect one of their number to be President of their Board, and they shall have power to fill all vacancies in their body, as these may from time to time occur, by resignation, expulsion, death or otherwise and shall have power to make and put in force such by-laws and regulations as shall from time to time be deemed necessary for the government of said corporation.

5 SEC. 4. That the board of trustees shall have power to appoint subordinate officers and agents, and to make, ordain and to establish such ordinances, rules and regulations, as they may deem necessary for the good government of said institution, its officers, teachers and pupils, and for the management of the affairs of said corporation to the best advantage. Provided, that they shall not contravene the constitution or laws of the United States, or the laws of this Territory.

SEC. 5. That all deeds and other instruments of conveyance shall be made by order of the board of Trustees, sealed with the seal of the corporation, signed by the president, and by him acknowledged in his official capacity in order to insure their validity.

SEC. 6. That the capital stock of said institution shall never exceed one hundred and fifty thousand dollars, nor the income or proceeds of the same be appropriated to any other use than for the benefit of said institution as contemplated by this Act.

SEC. 7. That this Act to take effect and be in force from and after its passage."

II.

That the said Act was approved by the Governor and became a law, and thereupon the provisions of said Grant were accepted by the said persons named therein, and their successors, as the president and trustees of Whitman Seminary, and thereupon and in pursuance of said grant there was established in Walla Walla County, in said Territory of Washington, an institution of learning for the instruction of persons of both sexes, in science and literature, and the same was thereupon, and until the date of the amendment of the above Act, as hereinafter set forth, conducted and maintained for the purposes and to the ends in said grant set forth, under the name of Whitman Seminary. In pursuance of the power vested in them by the said Act of the Legislative

6 Assembly of Washington Territory, the said President and Trustees of Whitman Seminary did acquire, by contribution from various persons and otherwise, a large amount of real and personal property in the Territory of Washington, which said property, together with the income and revenues derived therefrom, and the whole thereof, was at all times devoted to the instruction of persons of both sexes in science, literature and art at said institution.

III.

On the 20th day of November, 1883, the said Elkanah Walker, Cushing Eells and others, being desirous of enlarging the scope of said institution, and for the purpose of the better providing means for the education of the youth of both sexes in literature, science and art, and for the purpose of securing further voluntary contributions for said objects, obtained from the Legislature of the Territory of Washington an amendment of said Charter, and on said day the Legislative Assembly of the Territory of Washington duly passed an Act entitled, "An Act to Amend an Act entitled 'An Act to

Establish an Institution of Learning in Walla Walla County' passed December 20, 1859," in the words following, to-wit:

"SECTION 1. Be it enacted by the Legislative Assembly of the Territory of Washington: That the above named Act to establish an institution of learning in Walla Walla County, passed December 20, 1859, be and the same is hereby so amended that section first shall read as follows: That there shall be established in Walla Walla County an institution of learning for the instruction of both sexes in literature, science and art, to be called Whitman College; and that Elkanah Walker, George H. Atkinson, Elisha S. Tanner, Erastus S. Joslyn, W. A. Tenny, H. H. Spaulding, John C. Smith, James Craigie and Cushing Eells and their successors are hereby declared to be a body politic and corporate in law, by the name and style of the Board of Trustees of Whitman College.

SEC. 2. That section second of said Act shall be amended so as to read as follows: That the corporation before named shall have
7 perpetual succession, and shall have power to acquire by purchase, donation, devise or otherwise, and possess and hold property, real, personal and mixed, and the same to sell, grant, convey, rent or otherwise dispose of at pleasure, and they shall have power to contract and be contracted with, sue and be sued, plead and be impleaded, in all courts of justice, both at law and equity; they shall have and use a common seal, with power to alter it at pleasure, and they may exercise all the powers and enjoy all the privileges of other institutions of learning in this Territory.

SEC. 3. That section third of said Act shall be amended to read as follows: That the corporate concerns of said Whitman college shall be managed by the trustees themselves as a board, consisting of the nine members, and that a majority of the members of the board shall constitute a quorum for the transaction of business; said trustees shall elect one of their number to be president of their board, and they shall have power to fill all vacancies in their body as there may from time to time occur, by resignation, expulsion, death or otherwise, and shall have power to make and put in force such by-laws and regulations as shall from time to time be deemed necessary for the government of said corporation.

SEC. 4. That section fourth of said Act shall be amended to read as follows: That the board of trustees shall have the power of appointment and removal of the president of the college, professors, tutors, teachers and any other necessary agents and officers, and may fix the compensation of each, and may make such by-laws for the government of the institution as they may deem necessary, and shall have power to confer, on the recommendation of the faculty, all such degrees and honors as are conferred by colleges and universities of the United States, and such others (having reference to the course of study and the attainments of the applicants) as they may
8 deem proper. That the president and professors of the institution shall constitute the faculty of said college, and shall have power to arrange the course of study and to take proper measures to enforce the rules and regulations enacted by the board of

trustees for the government and discipline of the students, and to suspend and expel offenders as may be deemed necessary.

SEC. 5. That section fifth shall be amended so as to read as follows: That all deeds and instruments of conveyance shall be made by order of the board of trustees, sealed with the seal of the corporation, signed by the president and secretary of the board, and by them acknowledged in their official capacity in order to insure the validity of said deeds and instruments.

SEC. 6. That section sixth of said Act be amended to read as follows: That the property of said board of trustees of Whitman college, including all income and proceeds shall be used exclusively for the purposes of education, and in consideration of said use, said property, income and proceeds, shall not be subject to taxation.

SEC. 7. This Act shall take effect and be in force from and after its passage and approval."

IV.

That the said Act was approved by the Governor and became a law, and ther-upon, the said Elkanah Walker, George H. Atkinson, Elisha S. Tanner, Erastus S. Joslyn, W. A. Tenny, H. H. Spalding, John C. Smith, James Craigie and Cushing Eells, and their successors, as the Board of Trustees of Whitman College, duly accepted said grant, and ther-upon the said president and Trustees of Whitman Seminary, in pursuance of and in consideration of the grants specified in said Act of the Legislative Assembly of the Territory of Washington last set forth, and more especially in consideration of the provision in section 6 of said Act, exempting said property from

9 taxation, and not otherwise, transferred to and vested in the said Board of Trustees of Whitman College all the property, real and personal, which had been acquired and was at the date of the passage of said last named act held by the said President and trustees of Whitman Seminary, and thereafter and at all times since all of said property, real and personal, together with the revenue and income therefrom, the rents, profits and issues thereof, has been used exclusively for the purpose of education, and for the instruction of both sexes in literature, science and art.

V.

That thereupon, and at once upon the passage and approval of said last named act of the Legislative Assembly of the Territory of Washington, and in consideration thereof and not otherwise, there was established in Walla Walla County, as prescribed by said Act, an institution of learning for the instruction of both sexes in literature, science and art, which said institution was at said time, and has been at all times since, called Whitman College.

That said corporation has acquired by purchase, donation, devise and otherwise, and possesses and holds real and personal property of great value, all of which, including the revenue and income therefrom, has been at all times since its acquisition by said corporation and is now, used exclusively for the purposes of education.

VI.

Relying upon the grant contained in said last named Act of the legislative assembly of Washington Territory, and more especially upon that portion thereof which provides that all the property, income and proceeds of said Whitman College shall not be subject to taxation, a large number of persons, being desirous of advancing and bettering the condition of the youth of both sexes in the Territory and State of Washington by their instruction in literature, science and art, have, by gift, devise and bequest, given and granted to the said Board of Trustees of Whitman College a large amount of real and personal property now situate, lying and being in the County of Walla Walla and other portions of the State of Washington. Said property, real and personal, has been acquired by said Board of Trustees of Whitman College in pursuance of the powers vested in them by said Act of the Legislative Assembly of the Territory of Washington, and in consideration of the rights and powers reserved to them by said grant and more especially in consideration of that portion thereof which provides that said property shall not be subject to taxation. Said Board of Trustees of Whitman College has at all times used said property, and the whole thereof, acquired as aforesaid, exclusively for the purposes of education, and for the instruction of both sexes in science, literature and art. Out of said property so acquired and entrusted to them for the purposes aforesaid, and the rents, profits, incomes and revenues thereof, the said Board of Trustees of Whitman College has established a large institution of learning, situated in said Walla Walla County, wherein instruction in science, literature and art is afforded to all youth of both sexes, without discrimination, at a cost to them greatly less than the actual cost to the said Board of Trustees of Whitman College for the maintenance of said institution, all of which said Board of Trustees of Whitman College has been able to do by reason of the gifts and contributions made to them as aforesaid, and not otherwise.

VII.

The said Whitman College is situated in a thickly populated section of the State of Washington, far removed from any other institution of higher learning, so that it affords to a large portion of the youth of both sexes an opportunity for obtaining instruction in literature, science and art, of which they would be otherwise deprived.

Unless the provisions of said Charter shall be at all times regarded by the State of Washington and its officers, it will be impossible for said the Board of Trustees of Whitman College to secure further voluntary contributions for the support and conduct of said institution, and the scope and usefulness of said institution will be greatly abridged, and cannot meet the requirements of those seeking an opportunity of education.

VIII.

In pursuance of the powers vested in them by said legislative act of the Territory of Washington, and in the manner and by the means

and for the purposes and use aforesaid, the said Board of Trustees of Whitman College have acquired and now hold and possess the following described real estate, situate in Walla Walla County, State of Washington:

All of Block Eight and Lots One, Two, Three, Four and Five of Block Nine, of Langford's Addition to the City of Walla Walla;

All of Block Thirty-two of Mountain View Addition to the City of Walla Walla;

Lots Seven and Eight in Block One of Isaac's Second Addition to the City of Walla Walla;

All of Block Three and the West Half of Block Four of the Ransom Clark Donation Claim;

The West Half of Section Nine, in Township Eight, North, of Range Thirty-six, East W. M.;

The Northeast quarter and the East Half of the Northwest quarter of Section Twenty-six, in Township Seven, North, of Range Thirty-six, East W. M.;

The Southeast quarter of the Northwest quarter, the East half of the Southwest quarter and the Southeast quarter of Section Twenty-three, in Township Seven, North, of Range Thirty-six East W. M.;

And has further acquired, by virtue of the powers and in the manner and by the means and for the purposes and use hereinbefore specified, and now possesses a large amount of personal property now situate in said Walla Walla County, State of Washington, consisting of credits evidenced by promissory notes, secured by mortgage upon real estate in the State of Washington and other states, aggregating in value the sum of about Ninety-eight thousand four hundred dollars (\$98,400.).

That in addition thereto the said Board of trustees of Whitman College has acquired, by the means and in the manner and for the purposes and use hereinbefore set forth, and now holds, owns and possesses a large amount of property, real and personal situate in other counties of the State of Washington.

IX.

That all of said property, real and personal, hereinbefore described, and all the property of the said Board of Trustees of Whitman College, including all the income and proceeds thereof, has been at all times subsequent to said last named enactment by the Legislative Assembly of the State of Washington and is now used exclusively for the purposes of education and as hereinbefore set forth.

X.

On the 22nd day of February, 1889, the Congress of the United States duly passed an act providing that the inhabitants of that part of the area of the United States then constituting the Territory of Washington might become the State of Washington, and authorizing said inhabitants to adopt a constitution; and thereupon, in pursuance of said act, the said inhabitants of the said Territory of Washington did adopt a constitution; and on the 11th day of November, 1889, in accordance with said Act of Congress, the Presi-

dent of the United States proclaimed the admission of the State of Washington into the Union.

That in and by said constitution so adopted as aforesaid it was provided as follows, in Article VII, Section 1, thereof:

"All property in the State not exempt under the laws of the United States, or under this constitution, shall be taxed in proportion to its value, to be ascertained as provided by law. The legislature shall provide by law for an annual tax sufficient, with other sources of revenue to defray the estimated ordinary expenses of the State for each fiscal year. And for the purpose of paying the State debt, if there be any, the legislature shall provide for levying a tax annually, sufficient to pay the annual interest and principal of such debt within twenty years from the final passage of the law creating the debt."

And it is further provided in Section 2 of Article VII of said constitution as follows:

"The Legislature shall provide by law a uniform and equal rate of assessment and taxation on all property in the state, according to its value in money, and shall prescribe such regulations by general law as shall secure a just valuation for taxation of all property, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property; Provided That a deduction of debts from credits may be authorized; Provided, further, That the property of the United States, and of the State, Counties, School Districts, and other municipal corporations, and such other property as the legislature may by general laws provide, shall be exempt from taxation."

And it is further provided, in Section 3 of said Article VII, as follows:

"The legislature shall provide by general law for the assessing and levying of taxes on all corporation property as near as may be by the same methods as are provided for the assessing and levying of taxes on individual property."

And it is further provided by section 4 of said Article VII, as follows:

"The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the state shall be a party."

XI.

On the 15th day of March, 1897, the Legislative Assembly of the State of Washington passed an Act entitled, "An Act to provide for the assessment and collection of taxes in the State of Washington," wherein and by Section 1 whereof it is provided as follows:

"That all real and personal property now existing or that shall be hereafter created or brought into this State shall be subject to assessment and taxation for the support of the State government, and for county, school, municipal or such other purposes as shall be designated by law, upon equalized valuations thereof, fixed with reference thereto on the first day of March at twelve o'clock meridian in each

and every year in which the sum shall be listed, except such property as shall be expressly exempted therefrom by the provisions of law."

XII.

It is asserted and pretended by the said defendants that by virtue of said provisions of the constitution of the State of Washington and said enactment of its legislative Assembly as aforesaid, the property hereinbefore specified and all the property belonging to the Board of Trustees of Whitman College, held for the purposes and devoted to the uses aforesaid, is subject to taxation within the County of Walla Walla and State of Washington, notwithstanding the grant to said Board of Trustees of Whitman College and the provisions of said act of said Legislative Assembly of the Territory of Washington set forth in paragraph III thereof.

XIII.

That during all the times hereinafter mentioned the said R. J. Berryman was and now is the duly qualified and acting assessor, that said P. B. Hawley, during all the times hereinafter mentioned was and now is the duly qualified and acting treasurer, that said W. J. Honeycutt, during all the time hereinafter mentioned, was and now is the duly qualified and acting auditor, and the said J. H. Morrow, George Struthers and J. N. McCaw, during all the times hereinafter mentioned, were and are now the duly qualified and acting commissioners, constituting the Board of Equalization, of Walla Walla County, State of Washington.

XIV.

That during the year 1906, the said R. J. Berryman, assessor as aforesaid, pretending to act in pursuance of the provisions of the constitution and act of the Legislative Assembly of the State of Washington aforesaid, and pretending and asserting that the property of the said Board of Trustees of Whitman College is liable to be listed for taxation as other property within said State of Washington, listed, as provided by law for the listing of property not exempt from taxation, all the real property of the said Board of Trustees of Whitman College hereinbefore set forth as situate in Walla Walla County, State of Washington; and he did before the first Monday of August, 1906, file with the Clerk of the County Board of Equalization, for the purpose of equalization by said Board, a list of property in said Walla Walla County, and included therein as taxable the real property hereinbefore described belonging to the said Board of Trustees of Whitman College.

And the said R. J. Berryman, Assessor as aforesaid, pretending to act in pursuance of the provisions of the constitution and act of the Legislative Assembly of the State of Washington aforesaid, and pretending and asserting that the personal property of the said Board of Trustees of Whitman College is liable to be listed for taxation, now threatens, and will, unless enjoined by order of this Court, list for taxation all the personal property of the said Board of Trustees of Whitman College hereinbefore described.

XV.

That said J. H. Morrow, George Struthers and J. N. McCaw, acting as the Board of Equalization of said Walla Walla County as aforesaid, did on the 4th day of October, 1905, and 1906, levy taxes upon the property of the said Board of Trustees of Whitman College hereinbefore described in the sum of Nine Hundred forty-six & 32/100 Dollars; and the said W. J. Honeycutt, auditor as aforesaid, and acting as the Clerk of said Board of Equalization, threatens to deliver to the said P. B. Hawley, Treasurer of said County, the assessment books of said County, with his warrant thereto attached, authorizing the collection by him of taxes upon the property hereinbefore described of the Board of Trustees of said Whitman College; and the said P. B. Hawley, Treasurer as aforesaid, threatens to receive said tax roll and threatens to collect the taxes so unlawfully attempted to be levied upon the property of the said Board of Trustees of Whitman College, and unless said taxes are paid, or unless restrained by the order of this Court, will issue certificates of delinquency against the said property hereinbefore described and cause the sale thereof in the manner prescribed by law for the sale of property not exempt from taxation, and will, unless restrained by the order of this Court, distrain the personal property of your orator for the payment of said taxes so unlawfully attempted to be assessed, to the great and irreparable damage to your orator. If the property aforesaid of the said Board of Trustees of Whitman College is extended upon said Books, and taxes so levied against the same, unless said taxes so unlawfully levied are paid, a colorable lien will be thereby created against said property which will constitute a cloud upon the title to said property, to the great and irreparable damage to your orator. If the delinquent certificates are issued against said property for the nonpayment of said taxes so unlawfully levied, a multiplicity of suits for the enforcement thereof will arise, to the great and irreparable damage to your orator. That if taxes are levied upon the property of the said Board of Trustees of Whitman College as aforesaid, and collection thereof enforced, as it is hereinbefore set forth collection thereof will be attempted to be enforced by said defendants unless restrained by order of this Court, the said Board of Trustees of Whitman College will be compelled to pay as taxes upon its property aforesaid, annually, a large sum, to-wit, a sum in excess of \$2500.00.

XVI.

The matter in dispute herein exceeds, exclusive of interest and costs, the sum or value of Two Thousand Dollars.

XVII.

The said Board of Trustees of Whitman College do not own or possess any property which, or the income or proceeds of which, is not used exclusively for the purposes of education and for the instruction of both sexes in literature, science and art, so that the said Board of Trustees of Whitman College has no property in said County of Walla Walla subject to taxation.

XVIII.

That the Act of the Legislative Assembly of the Territory of Washington entitled "An Act to Amend an Act entitled 'An Act to Establish an Institution of Learning in Walla Walla County,' passed December 20, 1859," was recognized and treated as a valid and binding law of the Territory of Washington by all the authorities of said Territory, and each and all of its provisions were enforced and acted on by said authorities so long as said Territory remained in existence, and said Act was recognized and treated by the Congress of the United States as a valid, binding and effective law of the Territory of Washington from the time of its passage until the admission of the State of Washington into the Union. By Sections 1 and 2 of Article XXVII of the constitution of the State of Washington, it is provided as follows:

18 "SEC. 1. No existing rights, actions, suits, proceedings, contracts, or claims shall be affected by a change in the form of government, but all shall continue as if no such change had taken place; and all process which may have been issued under the authority of the Territory of Washington previous to its admission into the Union shall be as valid as if issued in the name of the State.

"SEC. 2. All laws now in force in the Territory of Washington which are not repugnant to this constitution shall remain in force until they expire by their own limitation, or are altered or repealed by the legislature: Provided, that this section shall not be so construed as to validate any act of the Legislature of Washington Territory granting shore or tide lands to any person, company, or any municipal or private corporation."

That said Amendatory Act of November 20, 1883, entitled, "An Act to Amend an Act entitled, 'An Act to Establish an Institution of Learning in Walla Walla County,' passed December 20, 1859," and particularly that part of said Act which exempts the property of the Board of Trustees of Whitman College from taxation, on its acceptance by the Board of Trustees of Whitman College, became a valid and binding contract between the Territory of Washington and the said Board of Trustees of Whitman College, which said contract could not be abrogated without the consent of the said Board of Trustees; that the action and threatened action of the defendants in this bill set out, averred and complained of, and the laws of the State of Washington under which defendants justify their said action, is violative of Section 10 of Article I of the constitution of the United States, in that it is an attempt by the State, without the consent of the Board of Trustees of Whitman College, to impair, abrogate and set at naught the contract aforesaid, and the action and threatened action of the said defendants, for the reason aforesaid, constitutes a cause of action in favor of complainant cognizable in this court.

19 In consideration thereof, and forasmuch as your orator is remediless in the premises at and by the strict rule of the common law, and is only relievable in a court of equity, where matters of this kind are properly cognizable and reviewable;

And to the end, therefore, that your orator may have that relief

which they can only obtain in a court of equity, and that the said defendants may answer the premises, but not upon oath or affirmation, verification of the answer being hereby expressly waived, they pray the Court:

I.

That the said R. J. Berryman, assessor as aforesaid, P. B. Hawley, treasurer as aforesaid, W. J. Honeycutt, Auditor as aforesaid, and the said J. H. Morrow, George Struthers and J. N. McCall, commissioners, constituting the board of equalization as aforesaid, may by order of this Honorable Court, be restrained and enjoined from listing for taxation or including upon the tax rolls of said county any of the property, real or personal, hereinbefore described, or any of the property, real or personal, belonging to the said Board of Trustees of Whitman College and that they and each of them be restrained and enjoined from attempting to collect or enforce, or in any way taking proceedings looking to the collection or enforcement of taxes upon any of the property, real or personal, belonging to the said Board of Trustees of Whitman College.

II.

That pending the determination of this action, Your Honors may grant a temporary restraining order, restraining the said R. J. Berryman, assessor as aforesaid, P. B. Hawley, Treasurer as aforesaid, W. J. Honeycutt, auditor as aforesaid, and the said J. H. Morrow, George Struthers and J. N. McCall, commissioners, constituting the Board of equalization as aforesaid, from listing or carrying as assessable upon the tax rolls of said Walla Walla County any
20 of the property of said Board of Trustees of Whitman College, and restraining them and each of them, during the pendency of this action, from attempting in any way to collect or taking any proceedings looking to the collection of any taxes upon any of the property, real or personal, of the said Board of Trustees of Whitman College.

III.

That your orator may have a decree of this Court, adjudging all the property hereinbefore described, and all the property, real and personal, of the said Board of Trustees of Whitman College, to be not taxable.

Any it may please your Honors to grant to your orator a writ of subpoena, to be directed to the said defendants, thereby commanding them at a certain time, and under a certain penalty therein to be limited, personally to appear before this Honorable Court and then and there full, true, direct, and perfect answer make to all and singular the premises, and to stand, perform and abide by such order, direction, and decree as may be made against them in the premises, as shall seem meet and agreeable to equity.

And your orator will ever pray.

GEORGE TURNER,
THOMAS BURKE,
ALLEN H. REYNOLDS,
W. T. DOVELL,
Solicitors for Complainant.

21 UNITED STATES OF AMERICA,
Eastern District of Washington, ss:

Stephen B. L. Penrose, being first duly sworn, deposes and says:
I am the President and a member of the Board of Trustees of
Whitman College, the complainant herein. I know the contents
of the foregoing Bill of Complaint, and, except as to those matters
which are stated upon information and belief, the same is true, and
as to those matters, I believe the same to be true.

STEPHEN B. L. PENROSE.

Subscribed and sworn to before me this 24th day of October, 1906.

A. R. BURFORD,
*Notary Public in and for the State of
Washington, Residing at Walla Walla.*

[Notarial Seal Affixed. Commission expires May 22nd, 1910.]

(Attached.)

Return on Service of Writ.

UNITED STATES OF AMERICA,
Eastern District of Washington, ss:

I hereby certify and return that I served the annexed Bill of
Complaint on the therein-named R. J. Berryman, Assessors, Oct. 31,
'06, and W. J. Honeycutt, Auditor, Oct. 31, '06, and George
Struthers, Commissioner, Oct. 31, '06, J. N. McCaw, Commissioner,
Nov. 1, '06, and P. B. Hawley, Treasurer, Nov. 1, '06, and J. H.
Morrow, Commissioner, Nov. 3, '06, all of Walla Walla County
Washington by handing to and leaving a true and correct *copy*s
thereof with R. J. Berryman, W. J. Honeycutt, George Struthers,
J. N. McCaw, P. B. Hawley and J. H. Morrow personally at Walla
Walla and Waitsburg in said District on the *Oct. 31, '06 & Nov.*
1 & 3th day of November the, A. D. 1906.

GEO. H. BAKER, *U. S. Marshal,*
By A. N. SHORT, *Deputy.*

Marshal Fees *Servis* \$12.00.

22 (Endorsed:) Original. No. 250. In the United States
Circuit Court, Eastern District of Washington, Southern Di-
vision. Board of Trustees of Whitman College, complainant, vs.
R. J. Berryman, Assessor, et al., defendants. Bill of complaint.
Filed in the U. S. Circuit Court, Eastern Dist. of Washington, Oct.
25, 1906, Frank C. Nash, Clerk; E. E. Wright Dep. Hughes, Mc-
Micken, Dovell & Ransey, Solicitors for Complainant. 661-670 Col-
man Block, Seattle, Wash. Papers may be served on Allen H. Rey-
nolds, Walla Walla, Washington.

23 United States Circuit Court for the Eastern District of Washington.

No. 250.

BOARD OF TRUSTEES OF WHITMAN COLLEGE

VS.

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer, W. J. HONEYCUTT, Auditor, and J. H. MORROW, George Struthers, and J. N. McCaw, Commissioners, Constituting the Board of Equalization of Walla Walla County.

Præcipe.

To the Clerk of the above entitled Court:

You will please issue subpœna in Equity with copies for service upon each of the Defendants in the above entitled Bill of Complaint.

BOARD OF TRUSTEES OF WHITMAN COLLEGE,

By ALLEN H. REYNOLDS, *Solicitor.*

(Endorsed:) No. 250. United States Circuit Court Eastern District of Washington. Trustees Whitman College vs. R. J. Berryman, Assessor et al. *Præcipe.* Filed Oct. 25th, 1906. Frank C. Nash, clerk. E. E. Wright, deputy.

United States Circuit Court for the Eastern District of Washington.

No. 250.

BOARD OF TRUSTEES OF WHITMAN COLLEGE, Complainant,

VS.

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer, W. J. HONEYCUTT, Auditor, and J. H. MORROW, George Struthers, and J. N. McCaw, Commissioners, Constituting the Board of Equalization of Walla Walla County, Defendants.

Appearance.

To the Clerk of the above entitled Court:

You will please enter our appearance as attorneys for complainant in the above entitled cause.

GEORGE TURNER,
THOMAS BURKE,
ALLEN H. REYNOLDS,
W. T. DOVELL,

Attorneys for Complainant.

(Endorsed:) No. 250. United States Circuit Court, Eastern District of Washington. Trustees Whitman College vs. R. J. Berryman, Assessor, et al. *Appearance.* Filed October 25, 1906. Frank C. Nash, clerk. E. E. Wright, deputy.

24 UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Judicial Circuit, Eastern District of Washington. In Equity.

The President of the United States of America, Greeting: To R. J. Berryman, Assessor; P. B. Hawley, Treasurer; W. J. Honeycutt, Auditor, and J. H. Morrow, George Struthers, and J. N. McCaw, Commissioners, Constituting the Board of Equalization of Walla Walla County:

You are hereby commended, That you be and appear in said Circuit Court of the United States aforesaid, at the Court Room of said Court, in the City of Walla Walla on the 3rd day of December, 1906, to answer a bill of Complaint filed against you in said Court by Board of Trustees of Whitman College and to do and receive what the Court shall have considered in that behalf. And this you are not to omit, under the penalty of Five Thousand Dollars.

Witness, The Honorable Melville W. Fuller, Chief Justice of the United States, and the seal of the said Circuit Court, the 25th day of October, 1906, and in the 130th year of the Independence of the United States of America.

[COURT SEAL AFFIXED.]

FRANK C. NASH, Clerk,
By E. E. WRIGHT,
Deputy Clerk.

Memorandum Pursuant to Rule 12, Supreme Court, U. S.

You are hereby required to enter your appearance in the above mentioned suit on or before the first Monday of December next at the Clerk's Office of said Court, pursuant to said bill; otherwise the said bill will be taken pro confesso.

FRANK C. NASH, Clerk,
By E. E. WRIGHT,
Deputy Clerk.

UNITED STATES OF AMERICA,
Eastern District of Washington, ss:

25 I hereby certify that I have served the within writ by delivering to and leaving a true copy thereof with R. J. Berryman, Assessors, Oct. 31-06, and W. J. Honeycutt, Auditor, Oct. 31-06, and George Struthers, County Commissioner, Oct. 31-06, J. N. McCaw, County Commissioner, Nov. 1-06, and P. B. Hawley, *Stearuer*, Nov. 1-06, and J. H. Morrow, County Commissioner, Nov. 6, all of Walla Walla County.

GEO. H. BAKER,
United States Marshal,
By A. N. SHORT, *Deputy.*

November 6th, 1906.

Fees <i>Servis</i>	12.
Mileage	11.10
	<hr/> \$23.10

(Endorsed:) Original. No 250. U. S. Circuit Court Ninth Circuit, Eastern District of Washington. In Equity. Trustees of Whitman College vs. R. J. Berryman, Assessor, et al. Subpœna. Filed in the U. S. Circuit Court Eastern Dist. of Washington. Nov. 22, 1906. Frank C. Nash, clerk, E. E. Wright, Dep.

26 United States Circuit Court for the Eastern District of Washington.

No. —.

BOARD OF TRUSTEES OF WHITMAN COLLEGE

VS.

R. J. BERRYMAN et al.

Appearance.

To the Clerk of the above entitled Court:

You will please enter my appearance as attorney for Defendants in the above entitled cause.

LESTER S. WILSON.

(Endorsed:) No. 250. United States Circuit Court, Eastern District of Washington. Board of Trustees of Whitman College vs. R. J. Berryman et al. Appearance. Filed December 4th, 1906. Frank C. Nash Clerk. E. E. Wright, deputy clerk. Lester S. Wilson, attorney for defendants.

27 In the Circuit Court of the United States, Ninth Judicial Circuit, Eastern District of Washington, Southern Division.

BOARD OF TRUSTEES OF WHITMAN COLLEGE, Complainant,

VS.

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer, W. J. HONEYCUTT, Auditor, and J. H. MORROW, George Struthers, and J. N. McCaw, Commissioners, Constituting the Board of Equalization of Walla Walla County, Defendants.

The Demurrer of R. J. Berryman, Assessor; P. B. Hawley, Treasurer; W. J. Honeycutt, Auditor, and J. H. Morrow, George Struthers, and J. N. McCaw, Commissioners, Constituting the Board of Equalization, of Walla Walla County, to the Bill of Complaint of the Board of Trustees of Whitman College, Complainant.

These defendants respectively by protestation not confessing or acknowledging all or any of the matters and things in said Plaintiff's bill to be true in such manner and form as the same are therein set forth and alleged, do demur thereto and for cause of demurrer, show:

First. That it appears by the Plaintiff's own showing by the said

Bill that it is not entitled to the relief prayed by said Bill against these defendants, or any of them.

Second. That it appears from said Bill of Complaint of the Plaintiff that this Court has no jurisdiction to hear and determine this action;

(a) The amount involved in this controversy is Nine Hundred and Forty-six and 32-100 Dollars, which amount is not sufficient to give this court jurisdiction of this cause.

(b) This Court is denied jurisdiction herein and precluded from a hearing of this action for the reason that the bill of complaint is brought to annul and enjoin the levy and collection by Walla

28 Walla County, State of Washington, of a State tax upon the property of the plaintiff situate in said County and State, and no jurisdiction is conferred upon said Court in such a case by the allegations in said Bill.

Third. That the said Bill of Complaint of the plaintiff is wholly without equity.

Wherefore, and for divers other good causes of demurrer appearing on said bill, these defendants respectively demur thereto, and they pray the judgment of this Honorable Court whether they shall be compelled to make further answer to the said bill, and they pray to be hence dismissed with their reasonable costs in their behalf sustained.

LESTER S. WILSON,
Attorney for the Defendants.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

LESTER S. WILSON,
Attorney for the Defendants.

STATE OF WASHINGTON,
Walla Walla County, ss:

W. J. Honeycutt makes solemn oath that he is the Auditor of Walla Walla County and State of Washington, and one of the defendants above named; that the foregoing demurrer is not interposed for delay.

W. J. HONEYCUTT.

Subscribed and sworn to before me this 19th day of November, 1906.

J. G. THOMAS,
Notary Public for Washington.

[Notarial seal affixed. Com. expires Sep. 26, 1910.]

Service of a copy of the foregoing demurrer acknowledged this 26th day of November, 1906.

ALLEN H. REYNOLDS,
Of Attorneys for Plaintiff.

(Endorsed:) No. 250. In the United States Circuit Court, Eastern District of Washington, Southern Division. Board of Trustees of Whitman College, Complainant, vs. R. J. Berryman, Assessor, et al., Defendants Demurrer. Filed Dec. 4th, 1906. Frank C. Nash Clerk.

29 In the Circuit Court of the United States for the Eastern District of Washington, Southern Division.

BOARD OF TRUSTEES OF WHITMAN COLLEGE, Complainant,
vs.

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer; W. J. HONEYCUTT, Auditor, and J. H. MORROW, George Struthers and J. N. McCall, Commissioners, Constituting the Board of Equalization of Walla Walla County, Defendants.

Stipulation.

It is stipulated by and between the respective parties hereto, that the following amendments may be made to the Bill herein, and that the demurrer of the defendants heretofore filed may be treated as running to said Bill as amended.

1. At the foot of paragraph fifteen (15), on page sixteen (16), may be inserted the following as a portion of the said paragraph: "That the said defendants, notwithstanding the premises, assert that all property, real and personal, of the said complainant hereinbefore described, is subject to taxation, and unless restrained by this court, the said defendants threaten to and will, each succeeding year, unless enjoined by this court disregard the rights of your complainant in the premises, and will each year list said property hereinbefore described and the whole thereof, for taxation; and said defendants threaten to and they and their successors in office will, unless said taxee so illegally assessed from year to year are paid or unless restrained by order of this court cause certificates of delinquency to be issued against said real property, thereby constituting a cloud upon the title thereto; and thereby and by the issuance of the said delinquent certificates from year to year as aforesaid, will cause a multiplicity of suits for the enforcement thereof;

And this complainant asserts, and by this action seeks
30 to enforce a right perpetual to the exemption of taxation of all the property, real and personal, of said complainant."

2. That there be added at the foot of paragraph three (3), of the prayer of said bill, the following: "And to be perpetually exempt from taxation under the laws of the State of Washington."

3. That there be added at the foot of page ten (10), of said bill, the following: "Which said real estate is and was at all the times hereinbefore mentioned, of the value of Ten Thousand (\$10,000) Dollars and upwards."

4. That there be added at the foot of paragraph ten (10), on page eleven (11) of the bill the following: "That all of the real property hereinbefore described has been acquired by the said com-

plainant since the date of the admission of the State of Washington into the Union as hereinbefore set forth."

5. That there be added at the foot of paragraph nine (9), on page eleven (11) of said bill, the following: "That none of the real estate hereinbefore described, is occupied by any buildings, campus or other improvements used in connection with said college, but the income and proceeds of said property and the whole thereof is used exclusively by said college for the purposes of education."

LESTER S. WILSON,
Attorney for Complainant.
W. T. DOVELL,
Of Attorney for Defendants.

(Endorsed:) No. 250. Trustees of Whitman College, vs. R. J. Berryman, Assessor, et al. Stipulation. Filed Dec. 4th, 1906.
Frank C. Nash, Clerk.

31 In the Circuit Court of the United States for the Eastern District of Washington, Southern Division.

No. 250.

BOARD OF TRUSTEES OF WHITMAN COLLEGE, Complainant,
vs.

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer; W. J. HONEYCUTT, Auditor, and J. H. MORROW, George Struthers and J. N. McCall, Commissioners, Constituting the Board of Equalization of Walla Walla County, Defendants.

Opinion.

Hon. George Turner, Hon. Thomas Burke, Allen H. Reynolds, and W. T. Dovell, for Complainant.
Otto B. Rupp, for Defendants.

Elkanah Walker, Cushing Eells, and others, on the 20 day of December, 1859, secured a charter from the Legislature of Washington Territory for the establishment of Whitman Seminary, an educational institution to be devoted to the instruction of persons of both sexes in science and literature. The persons therein named and their successors were declared to be a body politic and corporate, in law, by the name and style of the President and Trustees of Whitman Seminary. It was provided that the corporation should have perpetual succession, with power to acquire, possess, and hold property, real, personal and mixed, and to sell, grant, convey, rent or otherwise dispose of the same at pleasure; with power to sue and be sued, plead and be impleaded, in all courts of justice, both at law and in equity.

The persons named in the act of the Legislature, accepted the conditions of the grant, and established said seminary at Walla Walla in pursuance of its purposes, and in accordance with the pro-

visions therein contained. It was maintained as Whitman Seminary until the 20 day of November, 1883, when the act was amended by the territorial Legislature; the name was changed to Whitman College, and it was amended in other respects, but in so far as
32 vital to the matter now at issue, reference need only be made to section 6, which relates to taxation, and which reads as follows:

"That the property of said Board of Trustees of Whitman College, including all income and proceeds shall be used exclusively for the purposes of education, and in consideration of said use, said property, income and proceeds, shall not be subject to taxation."

Being thus empowered, Whitman College became the successor of Whitman Seminary and received by appropriate conveyances its property and assets, and thereafter continued to be, and is now maintained, as an educational institution for the purposes expressed and in accordance with the original act and the amendments thereto.

Thus may be briefly summarized the allegations of the bill in so far as it relates to the history of the subject-matter which leads up to the controversy in this case. That controversy arises out of the attempt of the defendants, who are alleged to be respectively the assessor, treasurer, auditor, and Board of County Commissioners of Walla Walla County, to assess for taxation, and levy taxes upon certain real property belonging to the complainant, which it is contended is in violation of the amendatory act of 1883, and it has taken the form of a demurrer to the bill of complaint, which challenges both the jurisdiction of the court and the equity of the bill.

First as to jurisdiction.

(a) It is objected that an amount sufficient to sustain jurisdiction is not disclosed, the tax sought to be collected being \$946.32; that the amount of the tax and not the value of the property taxed furnishes the criterion by which jurisdiction should be determined; and that future taxation is so speculative and involved in so much
uncertainty as not to be the subject of inquiry; that complainant may not be the owner of the property, and if so
33 future taxes may not be assessed. As to the extent of this rule we must now enquire.

In *Citizens' Bank vs. Cannon*, 164 U. S., 319, 322, the Supreme Court in discussing this question said:

"The purpose of the bill is to restrain certain tax assessors and tax collectors from collecting taxes for specific years, and, if the amount of such taxes does not confer jurisdiction, it is, from the nature of things, impossible for a court to foresee what, if any, taxes may be assessed in the future."

So it was thus stated in *Holt vs. Indiana Mfg. Co.*, 176 U. S., 72:

"And the effect on future taxation of a decision that the particular taxation is invalid cannot be availed of to add to the sum of value of the matter in dispute."

That the rule is well settled the following authorities will attest:

Fishback vs. Western Union Tel. Co., 161 U. S., 96.

Washington, etc. Rd. vs. District of Columbia, 146 U. S., 231.

- New England Mortgage Security Co. vs. Gay, 145 U. S., 123-130.
 Northern Pacific Railroad Co. vs. Walker, 148 U. S., 392.
 Walter vs. Northeastern Railroad, 147 U. S., 370.
 Clay Center vs. Farmers' Loan & Trust Co., 145 U. S., 224.
 Mayor, etc. of Baltimore vs. Postal Tel. Cable Co., 62 Fed., 500.
 Linehan Railway Transfer Co. vs. Pendergrass, 70 Fed., 1.
 Woodman vs. Ely, 2 Fed., 839.
 Murphy vs. East Portland, 42 Fed., 308.

Nor can the contingent loss which may be sustained by either of the parties through the probative effect of the judgment, however certain it may be that such loss will occur, be considered for the purpose of sustaining jurisdiction.

- New England Mortgage Co. vs. Gay, 145 U. S., 123.
 Rude vs. Westcott, 130 U. S., 152.
 Elgin vs. Marshal, 106 U. S., 578.
 Gibson vs. Shufeldt, 122 U. S., 27.
 Bruce and Another vs. Manchester & Keene Rd., 117 U. S., 514.

In the latter case it was held:

"The matter in dispute, on which the jurisdiction of this Court depends, is the matter which is directly in dispute in the particular cause in which the judgment or decree sought to be reviewed has been rendered; and the court is not permitted, for the purpose of determining its sum or value, to estimate its collateral effect in a subsequent suit between the same or other parties."

34 These authorities would at first blush appear to deny the jurisdiction of the court in this case, such was my firm conviction until this opinion was in course of preparation. The correct solution of the question turns upon what is in dispute here; whether it is the taxes now assessed, and which may in the future be assessed or whether it is the right to be exempt from taxation pursuant to the terms of the statute. That the Supreme Court had in mind a distinction in this regard is disclosed by reference to *Citizens' Bank vs. Cannon*, *supra*, where this language was used:

"It is further argued that jurisdiction may be seen in the avowment of the bill that the value of the exemption of the bank's property during the continuance of its charter exceeds two thousand dollars for each parish. But the answer to this is, that this is not a suit to exempt property from taxation permanently. The purpose of the bill is to restrain certain tax assessors and tax collectors from collecting taxes for specific years, and, if the amount of such taxes does not confer jurisdiction, it is, from the nature of things, impossible for a court to foresee what, if any, taxes may be assessed in the future."

Complainant was seeking in this case to enforce an exemption granted by the Laws of the State of Louisiana but, the object sought was to be exempt from the payment of taxes already assessed, asserted it is true, by reason of the act of exemption and in reliance

upon it; but the purpose of the suit related wholly to particular taxes less than the jurisdictional amount, together with those anticipated for succeeding years.

In *Acott vs. Donald*, 165 U. S., 58, interference with the right to import liquors into South Carolina, was the ground upon which an injunction was sustained. It is true in that case it was stipulated between the parties that the right to import liquors in the manner in which the complainant had been importing them, and intended in the future to import them, was of the value of \$2000 and upwards, but the stipulation related purely to a question of fact, and the jurisdiction could only have been sustained upon the principle that complainant's right to import liquors was the matter in dispute, for the tax complained of was of insignificant amount.

35 *Lanning vs. Osborne et al.* 79 Fed. 657, was a suit which involved water rates for irrigation which had been fixed at \$3.50 per acre, the purpose of the suit being to establish the right to collect \$7.00 per acre. In referring to the argument against jurisdiction Judge Ross in sustaining it said:

"I am unable to see the least ground for their contention. But for the high character of the counsel, and for the earnestness with which they press the point, I should be disposed to think it a little less than absurd to say that the subject-matter of the controversy between the complainant and the respective defendants in the sum of \$3.50—the mere difference between the annual rate contended for by the defendants and that to which the complainant asserts a right. The real subject of the controversy is the asserted right on the part of the land and town company to establish the rates at which it will furnish water to the defendants for the purpose of irrigation, in the absence of any action on the part of the Board of Supervisors of the County. The establishment of that right, denied by the defendants, is the principal object of the bill, and it is the value of that right which constitutes the amount in controversy. *Railway Co. vs. Kuteman*, 4 C. C. A. 503, 54 Fed., 547; *Fost. Fed. Prac.* sec. 16; *Stinson vs. Dousman*, 20 How. 461; *Railroad Co. vs. Ward*, 2 Black, 485. The bill shows the value of that right to be more than \$2000."

Nashville, C. & St. L. Ry. Co. vs. McConnell, et al. 82 Fed., 65, was a suit to restrain "scalpers" from buying and re-selling tickets to the Tennessee Centennial Exposition. It was held in a suit for injunction that the amount in dispute is not determined by the amount which the complainant might recover from the defendant in an action at law for the acts complained of, but by the value of the right to be protected, or the extent of the injury to be prevented by the injunction.

The amount requisite to give jurisdiction was denied in *Morris vs. Bean*, 146 Fed., 423, and *Spaulding et al vs. Evenson, et al.*, 149 Fed., 913, both of which were before the writer of this opinion for trial. The jurisdiction was sustained upon what may be fairly considered the same theory upon which counsel for complainant would sustain it here; in the former case the controversy arose over

the claim to the waters of a natural stream for irrigation; the holding was that the right to the use of the water was in issue, 36 not the value of the land upon which the water was to be used; and so in the latter the value of the right of the complainants to carry on their business was alleged to be in excess of \$2000; the jurisdiction was sustained upon that allegation, and upon appeal to the Circuit Court of Appeals, with that point distinctly in issue, the case was affirmed; 150 Fed., 517.

The value of the property described is alleged to be \$10,000. The grounds relied upon for relief are as follows:

"That if taxes are levied upon the property of the said Board of Trustees of Whitman College as aforesaid, and collection thereof enforced, as it is hereinbefore set forth collection thereof will be attempted to be enforced by said defendants unless restrained by order of this Court, the said Board of Trustees of Whitman College will be compelled to pay as taxes upon its property aforesaid, annually, a large sum, to-wit, a sum in excess of \$2500.00."

It is also alleged:

"And this complainant asserts, and by this action seeks to enforce a right perpetual to the exemption of taxation of all the property, real and personal, of said complainant."

"That the matter in dispute herein exceeds exclusive of interest and costs the sum or value of \$2000.00."

And complainant prays, among other things,

"to be perpetually exempt from taxation under the laws of the State of Washington."

Accepting these allegations as they must be considered for the purposes of the present inquiry, at best it would be premature to say that if it be true that donations have been made upon the strength of the assurance that taxes would not be levied upon the property of complainant as alleged, it may well be supposed that the withdrawal of that privilege would deter others from making like donations, and the effect of the change upon the status of its property, and upon the efficiency of the institution itself, might be such as to depreciate the value of its charter to such an extent as would bring it within the power of the Circuit Court to consider the contention which the complainant makes; and if it be true that the right which it seeks to enforce in this suit is of such a value, then

37 a very different question is presented from that of a tax less in amount than that which this court is authorized to consider, even though such relief might be sought under a valid statute which gives exemption. The scope of the bill is clearly one beyond mere relief against the tax which is mentioned. It is one to maintain a contract which it claims is guaranteed under the constitution of the United States. The value of that right must be found before it can be held that the complainant is remediless here. To be exempt from taxation is the relief sought, and while this incidentally involves the validity of a particular tax, it does not limit

the power to inquire into the value of that which it is the purpose of the bill to protect.

Smith vs. Adams, 130 U. S. 167.

Albright vs. Sandoval, 200 U. S., 9.

Stinson vs. Dousman, 20 How., 461-467.

American Fertilizer Company vs. Board of Agriculture of North Carolina, 43 Fed., 609.

Simon et al. vs. House, et al. 46 Fed., 317.

Humes vs. City of Fort Smith, Ark., 93 Fed., 857.

Delaware L. & W. Co. vs. Frank, 110 Fed., 694.

Southern Express Co. vs. Mayer etc. of Ensley, 116 Fed., 756.

City of Hutchinson vs. Beckham, 118 Fed., 401.

Pennsylvania Company vs. Bay, 138 Fed., 203.

(b). The parties, complainant and defendants, are citizens and residents of this district. Complainant relies upon section 10, article 1, of the constitution of the United States, which prohibits the impairment of contracts, and upon the Act of Congress which vests in the Circuit courts power to hear controversies arising under the Federal Constitution and laws. (25 Stat. L. 434).

The power to hear the cause by reason of the amount involved appearing to be sufficient, the position of complainant's counsel has the sanction of authorities which need only be cited to illustrate their controlling force upon this phase of the case.

Given vs. Wright, 117 U. S., 648-655.

Yazoo etc. R. R. Co. vs. Thomas, 132 U. S. 174.

38 Wilmington & Weldon R. R. Co. vs. Alsbrook, 146 U. S. 279.

Illinois Central R. R. Co. vs. Adams, 180 U. S., 28.

Starin vs. New York, 115 U. S., 257.

Walla Walla vs. Walla Walla Water Co., 172 U. S., 1.

Vicksburg Water Power Co. vs. Vicksburg, 185 U. S., 65.

Nashville Ry. Co. vs. Taylor, 86 Fed., 168.

Has the complainant such a contract, and would it be impaired by the levy and collection of taxes upon its property? Thus we are brought to the most important question to be considered.

The suggestion made in argument that those properties not devoted to the actual use of the college, that is, occupancy for educational purposes, do not fall within the language of the act, may be dismissed with the remark that such a construction is not consistent with the manifest intent of the Legislature, namely, to establish an educational institution and to provide assistance for it by exempting its property from the burdens imposed for governmental purposes. The contention is neither justified by the letter nor the spirit of section 6. The provision "that the property of said Board of Trustees of Whitman College, including all income and proceeds, shall be used exclusively for the purposes of education," and shall be exempt from taxation, must be taken in connection with the well-known ways by which such institutions are endowed. The privilege granted would be of but slight consequence if it could only apply to

the buildings and grounds occupied for the uses of the college as such. The word "income," taken in connection with the context, clearly indicates an intent to exempt that which should be or become available for the maintenance of the college; and it is difficult to conceive how more apt words could have been used to express that intent than those which so concisely and yet comprehensively

39 imply that all the property, whether income producing or otherwise, should be exempt from taxation. In the nature of things there can be no income from the college buildings. To hold with the contention that words of such clear import were only intended to apply to a part of the property, and to that part from which no income or proceeds could in any way be derived, would be to do violence to the ordinary rules of construction, to override the express language of the Act, and to overlook that which it must be conclusively presumed was in the minds of the legislators when dealing with the subject, namely, the institutions of this character are almost invariably maintained by income derived from investments, and those generally secured by donation.

Passing to the more serious suggestion, which is that it was beyond the power of the Territorial Legislature to enact the amendment under which the complainant claims exemption from taxation, and treating this phase of the case as relating to jurisdiction rather than as discretion in its exercise, it may be remarked, and indeed it is not seriously disputed, that prior to 1867 there was no congressional or other inhibition which would have prevented the enactment of such a statute. The difficulty arises on account of an amendment to the Organic Act of the Territory, which reads as follows:

"That the legislative assemblies of the several Territories of the United States shall not, after the passage of this Act, grant private charters or especial privileges, but they may by general incorporation acts permit persons to associate themselves together as bodies corporate, for *mining*, manufacturing, and other industrial pursuits."

14 Stat. L. p. 426.

It will be observed that the original act incorporating Whitman Seminary was at a time prior to the adoption of this amendment, and that the amendment to that act was afterwards. This involves the necessity of inquiry into what was meant by "especial privileges."

As preliminary it is proper to observe, as counsel have so well argued, that the subject of education has ever been uppermost in the minds of those who have established the outposts of
40 civilization. The log schoolhouse has always accompanied the earlier efforts of pioneer life. It has been understood from the beginning that the means of education, as a rule should not be called upon to contribute to the public expenses. Experience has shown that attempts of this character have always been made at the sacrifice of the persons engaged in educational work. The assumption being that no ignorant people could be civilized, it was foreseen that the best available means for moral and material development was by the dissemination of knowledge; and as the work was of a charitable nature, as usual with small reward to those engaged

in it, it was thought proper as contributing to the growth of the country to aid by exempting the accumulations received at the hands of charitably disposed persons from the ravages of the tax collector.

These thoughts become peculiarly pertinent to this case when it is recalled that this association of pioneers, as early as 1859, were struggling to carry on what at that time was an undertaking which displayed much public spirit and was of great hardship and self denial; one which it is well known was of extreme difficulty considering the early days, the sparsity of settlement, the want of facilities, the absence of wealth, the remoteness from centers of population, and the dangers attending communication with the more highly developed and well established communities of the country. And no doubt in consideration of the efforts of these pioneers, which had in a measure been successful and for the encouragement of education in the territory, the Legislature deemed it wise to render further aid, and to give assurance of its approval of their strenuous endeavors, by holding out the inducement to them and to their successors and to those who might look with favor upon their early strug-

41 gles, that upon any accumulation of property thus brought together for the public benefit the people of the territory could well afford to forego the mere pittance which might from time to time thus be collected by the levy of taxes. The appreciation of the fact that education and refinement are more likely to go hand in hand with virtue and better lead to good citizenship, to the observance of the laws, and the good order of the community, than do illiteracy and ignorance, constitutes the consideration,—the public benefit, which justifies the exemption from taxation which the Legislature saw fit to give. It was fitting that such prescience should have induced so commendable an effort to commemorate, in the beautiful valley where he met his tragic death, the heroic deeds of one who contributed so much to the assertion of our title to the Oregon country since fully assured through his material aid, and which has become so vast an empire of wealth and civilized life.

There was no contemporaneous grudging of favors, whether asked of the public or bestowed by the munificence of individuals, and I cannot refrain from mentioning the lively recollection of the wonderment expressed by counsel at the bar than an institution of so much merit should meet with such a technical contention in the house of its friends. Not being organized for profit, and promoters of such institutions being able to receive no reward except that which goes with good works, it is hardly to be supposed that the evil which Congress had in view in referring to especial privileges, when it laid its prohibitory hand upon the power delegated to the legislatures of the territories, related to matters of the character now under review, but rather that it was intended to prevent, as the words imply, the granting of corporate charters by legislative action, with which was so often coupled the giving of exclusive rights, as the building of public highways, toll roads, ferry and bridge franchises and the like, which had come to be an abuse, at least in the territory of Washington, as an examination of the session laws will abundantly disclose. It was in

42 this respect and with this abuse in view that the language must be construed, and the words "especial privileges," coupled with private charters, must have been intended to relate to those exclusive grants so common in the early history of the territory. Thus we must conclude contrary to that which superficially appears, that it was not intended in the early days of western development to prevent the struggling pioneers from aiding those who were seeking to build up schools and colleges; that nothing was further from the intent of Congress than to hinder, harass or annoy such efforts, or to deprive the people from giving such aid as has from the earliest settlement been so often and so freely accorded.

If this be the correct view it disposes of this branch of the case. We are not without authority giving that construction to the term upon which complainant relies.

Immunity from taxation conferred on a corporation by legislation is not a franchise; nor does such immunity pass under a decree providing that the purchaser shall succeed to all franchises, rights and privileges.

Chesapeake & Ohio Railway Co. vs. Miller, 114 U. S., 176.

In the sale of a franchise transferring all "rights, privileges, and immunities" of one insurance company to another the right to be exempt from taxation granted to the first company did not pass by such words.

Phoenix Ins. Co. vs. Tennessee, 161 U. S., 174.

"The term 'especial privileges' refers to the granting of monopolies such as ferries, trade-marks, the exclusive right to manufacture certain articles, or to carry on certain business in a particular locality to the exclusion of others."

Elk Point vs. Vaughn, (Dak.), 46 N. W., 577.

The constitutional provisions that the legislature shall not pass "a private or local bill * * * granting to any private corporation * * * any exclusive privilege", does not prohibit the enactment of a statute providing for payment of percentages upon gross premiums in lieu of other taxes.

43 Trustees of Exempt Fireman's Fund vs. Roome, 93 N. Y., 48.

The term "privileges" does not include immunity from taxation unless the other provisions of the Act give such meaning to it.

Pickard vs. Tennessee, etc. Railroad Co., 130 U. S., 642.

A grant of lands to a railroad corporation to be used as passenger and depot grounds and other public purposes, was not a grant of a special or exclusive privilege in violation of the constitution of Illinois.

State of Illinois vs. Illinois Cent. R. R. Co., 33 Fed., 730.

There is another view which cannot pass unnoticed. Undoubtedly Congress could have enacted the statute in question. By section 1851 R. S. the legislative power of the territories was extended to all right-

ful subjects of legislation not inconsistent with the constitution and laws of the United States. One of the provisions of the Organic Act (Sec. 1850 R. S.), reads as follows:

"All laws passed by the legislative assembly and governor of any territory except in any territories of Colorado, Dakota, Idaho, Montana and Wyoming shall be submitted to Congress, and, if disapproved, shall be null and of no effect."

It is not altogether clear that a legislative Act passed by a territory will become effective as against a previous inhibition contained in the organic act of such territory; on the other hand the case of *Morman Church vs. United States*, 136 U. S., 1, would seem to hold to the contrary; yet it is settled that where the act passed involves the construction of a statute rather than the violation of an act of Congress that it will be assumed that in the absence of an express disapproval on the part of Congress that it considered the act in question as extending to a rightful subject of legislation not inconsistent with the constitution or laws of the United States. Such seems to be the construction of the Supreme Court in *Miners' Bank vs. State of Iowa*, 12 Howard, 1-8, where it is said, at page 7:

44 "Congress in creating the territorial governments, and in conferring upon them powers of general legislation, did not, from obvious principles of policy and necessity, ordain a suspension of all acts proceeding from those powers, until expressly sanctioned by themselves, whilst for considerations equally strong they reserved the power of disapproving or annulling such acts of territorial legislation as might be deemed detrimental. A different system of procedure would have been fatal to all practical improvement in those territories, however urgently called for; nay, might have disarmed them of the very power of self preservation."

"The argument would render also the acts of the territorial government, even the most wholesome and necessary, and though indispensable carried to the extreme of authority, obnoxious to the charge of usurpation or criminality. The reverse of this argument, whilst it is accordant with the investiture of general legislative power in the territorial governments, places them in the position of usefulness and advantage towards those they were bound to foster, and subjects them at the same time to proper restraints from their superior."

The provision that the acts of a territorial Legislature may be submitted to Congress for approval, and that if disapproved they shall be of no effect, warrants the inference that where an act has been brought to the attention of Congress and that body has suffered it to remain without disapproval for several years, that it approves of it.

"In the first place we observe that the law has received the implied sanction of congress. It was adopted in 1859. It has been upon the statute book for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the Secretary of the Territory to transmit to that body copies of all laws, on or before the 1st of the next December in each year. The simple disapproval by congress at any time, would have

annulled it. It is no unreasonable inference, therefore, that it was approved by that body."

Clinton vs. Englebrecht, 80 U. S., 446.

Baca vs. Perez, 42 Pac., 162.

Equities of the Bill.

The defendant has invoked a rule, often announced by the Supreme Court, a succinct statement of which is found in *Pittsburgh Railway vs. Board of Public Works*, 172 U. S., 37, in this language:

"The collection of taxes assessed upon the authority of a state is not to be restrained by writ of injunction from a court of the United States, unless it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are special circumstances bringing the case under some recognized head of equity jurisdiction."

45 In *Oregon Railroad & Navigation Company vs. Walla Walla County, et al.*, by opinion filed on the 25th ultimo in this court, the occasion was presented for applying this rule to the facts there relied upon where the same objection was made to an injunction against what was alleged to be an illegal tax. It was then concluded that the issuance of certificates of delinquency under section 1750 of Ballinger's Code, on account of the presumptions which attended such certificates, create a cloud upon the title to real property. This conclusion was reached upon the authority of the construction given the statutes of the State by its highest court.

That an illegal tax is a cloud upon the title to real estate and that the right exists in this state to a remedy in equity for its removal, see:

Andrews vs. King County, 1 Wash., 46.

Benn vs. Chehalis County, 11 Wash., 134.

Phelan vs. Smith, 22 Wash., 397.

Kinsman et al. vs. Spokane, 20 Wash., 118.

Lewiston Water Co. vs. Asotin County, 24 Wash., 371.

Northwestern Lumber Co. vs. Chehalis County, 24 Wash., 626.

This case presents grounds for equitable interference within a "recognized head of equity jurisdiction."

There is no adequate remedy at law by the recovery of taxes paid. It would not only involve a multiplicity of suits, but its adequacy might be seriously impaired by the distribution of the funds. The difficulty of collection after judgment where no execution can issue; the vexation attending such a proceeding; the possible doubt which may attend the right to sue the county when school, state or municipal taxes are involved, which may have been apportioned, distributed, and paid out, clearly demonstrate the inadequacy of an action at law to recover money paid, and so it seems to have been regarded in this jurisdiction. The complainant in this case would

46 be compelled to resort to a multiplicity of suits, and aside from this its object is wholly inequitable. Numerous parcels of land are mentioned. The statute requires that each parcel be assessed separately and separate certificates issue. One certificate may pass into the hands of one purchaser, another into those of another, or the county may, pursuant to the provisions of the statute, become the purchaser. The certificates draw interest at the rate of 15% per annum. Where the rights of a litigant are in controversy equity may restrain that which is clearly unauthorized, and in a matter of this kind a party is entitled to know whether a claim is valid or not before being put to the hazard of paying so exorbitant a rate of interest.

Those being my conclusions the demurrer will be overruled.

EDWARD WHITSON, *Judge*.

(Endorsed:) No. 250. In the Circuit Court of the United States for the Eastern District of Washington, Southern Division. Board of Trustees of Whitman College, Complainant, vs. R. J. Berryman, Assessor, P. B. Hawley, Treasurer, W. J. Honeycutt, Auditor, and J. H. Morrow, George Struthers and J. N. McCall, Commissioners, constituting the Board of Equalization of Walla Walla County, Defendants. Opinion. Filed June 4, '07. F. C. Nash, Clerk, per E. E. Wright, Dep.

47 United States Circuit Court for the Eastern District of Washington.

No. 250.

BOARD OF TRUSTEES OF WHITMAN COLLEGE, Complainant,
vs.

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer; W. J. HONEYCUTT, Auditor, and J. H. MORROW, George Struthers and J. N. McCall, Commissioners, Constituting the Board of Equalization of Walla Walla County, Defendants.

Appearance.

To the Clerk of the above entitled Court:

You will please enter my appearance as attorney for Defendants in the above entitled cause.

OTTO B. RUPP,
Attorney for Defendants.

(Endorsed:) No. 250. United States Circuit Court, Eastern District of Washington. Board of Trustees of Whitman College, Complainant, vs. R. J. Berryman, Assessor, et al., Defendants. Appearance. Filed June 5, 1907. Frank C. Nash, Clerk. E. E. Wright, Deputy Clerk.

48 In the Circuit Court of the United States for the Eastern District of Washington, Southern Division.

No. —.

BOARD OF TRUSTEES OF WHITMAN COLLEGE, Complainant,
vs.

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer; W. J. HONEYCUTT, Auditor, and J. H. MORROW, George Struthers and J. N. McCall, Commissioners, Constituting the Board of Equalization of Walla Walla County, Defendants.

Order to Take Bill as Confessed.

It appearing to the Court that the bill in the above entitled cause was duly filed, and that subpoena was duly issued and served on the defendants herein, and that the said defendants duly appeared and demurer to said bill within the time prescribed by law; and said cause having come on for hearing upon the demurrer of the said defendants to the bill as amended by the stipulation of the parties, and upon hearing, the said demurrer was over-ruled and the defendants assigned to answer and the said defendants, and each of them, here and now announcing that they decline to answer or plead further to said bill;

Now, therefore, on motion of George Turner, Thomas Burke, Allen H. Reynolds and W. T. Dovell, solicitors for Complainant, it is ordered and decreed that said Bill, as amended by the stipulation on file herein, be taken as confessed as to the said defendants, and each of them.

EDWARD WHITSON,
United States District Judge.

Copy of within order received and due service of same acknowledged this — day of Apr., 1908.

Solicitor for Defendants.

(Endorsed:) Original. No. 250. In the United States Circuit Court, Eastern District of Washington, Southern Division. Board of Trustees of Whitman College, Complainant, vs. R. J. Berryman, Assessor et al., Defendants. Order to take bill as confessed. Filed in the U. S. Circuit Court, Eastern Dist. of Washington, Jul. 10, 1908. F. C. Nash, Clerk. E. E. Wright, Deputy. Hughes, McMicken, Dovell & Ramsey, Solicitors for Complainant, 661-670 Colman Building, Seattle, Wash.

49 In the Circuit Court of the United States for the Eastern District of Washington, Southern Division.

No. —.

BOARD OF TRUSTEES OF WHITMAN COLLEGE, Complainant,

VS.

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer; W. J. HONEYCUTT, Auditor, and J. H. MORROW, George Struthers and J. N. McCall, Commissioners, Constituting the Board of Equalization of Walla Walla County, Defendants.

Decree pro Confesso.

It appearing to the court that the bill in the above entitled cause was duly filed herein and that subpoena was duly issued and served on the defendants, and each of them, and that said defendants and each of them thereupon appeared and demurred to the said bill, as amended by stipulation of the respective parties, said demurrer having been duly heard and overruled and the said defendants, and each of them, assigned to answer further, and the said defendants and each of them, then and there announcing that they decline to answer or plead further and that an order taking the bill as confessed was duly entered in the order book on the — day of April, 1908, in the office of the Clerk of this Court and that no proceeding has been taken by the said defendants, or any of them, since the entry of said order, and the said defendants, and each of them, now appearing in open Court by their solicitor, Otto B. Rupp, and waiving further time to answer, plead or take further proceeding;

It is, on motion of George Turner, Thomas Burke, Allen H. Reynolds and W. T. Dovell, ordered, adjudged and decreed that the said R. J. Berryman, Assessor, P. B. Hawley, Treasurer, W. J. Honeycutt, Auditor, and J. H. Morrow, George Struthers and J. N. McCall, Commissioners, constituting the Board of Equalization of Walla

50 Walla County, State of Washington, and each and every of them and each and every of their successors, be and they hereby are restrained and enjoined from listing for taxation or including upon the tax rolls of the said County of Walla Walla, any of the property, real or personal, belonging to the complainant herein; and that they, and each of them, be restrained and enjoined from attempting to collect or enforce, or in any way taking proceedings looking to the collection or enforcement of taxes upon any of the property, real or personal, belonging to the said Board of Trustees of Whitman College; and that all the property, real and personal, of the said Board of Trustees of Whitman College is not taxable;

And it is further ordered, that the said complainant do have and recover of the said defendants, its costs and disbursements herein to be taxed according to the rules of this court.

Dated this 10th day of April, 1908.

EDWARD WHITSON,

United States District Judge.

Costs taxed by Clerk, Ninety-four and 50/100 Dollars.

Copy of within decree received and due service of same acknowledged this — day of April, 1908.

— — —
Solicitors for Defendants.

(Endorsed:) Original. No. 250. In the United States Circuit Court Eastern District of Washington, Southern Division. Board of Trustees of Whitman College, Complainant, vs. R. J. Berryman, Assessor et al., Defendants. Decree Pro Confesso. Filed in the U. S. Circuit Court, Eastern Dist. of Washington Jul- 10, 1908. F. C. Nash, Clerk. E. E. Wright, Deputy. Hughes, McMicken, Dovell & Ramsey, Solicitors for Complainant, 661-670 Colman Building, Seattle, Wash.

51 In the Circuit Court of the United States for Southern Division of the Eastern District of Washington.

Number 250.

THE BOARD OF TRUSTEES OF WHITMAN COLLEGE, Plaintiffs,
versus
R. J. BERRYMAN et al., Defendants.

The Clerk of the above entitled court will please enter our names and appearances as counsel and solicitors for the Defendants in the above entitled cause.

OTTO B. RUPP.
HERBERT C. BRYSON.
EVERETT J. SMITH.

Postal addresses Walla Walla, Washington.

(Endorsed:) Number 250. In the Circuit Court of the United States Southern Division Eastern District of Washington. The Board of Trustees of Whitman College, Plaintiffs, versus R. J. Berryman et al., Defendants. Appearances. Filed Jan. 12-'09. F. C. Nash, Clerk, by E. E. Wright, Dep. Otto B. Rupp, Herbert C. Bryson, Everett J. Smith, Solicitors for Defendants, Walla Walla, Washington.

In the Circuit Court of the United States for the Southern Division of the Eastern District of Washington.

THE BOARD OF TRUSTEES OF WHITMAN COLLEGE, Plaintiff,
vs.

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer; W. J. HONEYCUTT, Auditor, and J. H. MORROW, George Struthers, J. N. McCaw, County Commissioners, Constituting the Board of Equalization of Walla Walla County, Washington, Defendants.

Petition for Writ of Error.

52 The above named Defendants, R. J. Berryman, Assessor, P. B. Hawley, Treasurer, W. J. Honeycutt, Auditor and J.
5—533

H. Morrow, George Struthers and J. N. McCaw, County Commissioners constituting the Board of Equalization of Walla Walla County, Washington, conceiving themselves aggrieved by the judgment entered on July 10 1908, in the above entitled cause, hereby pray the court for a Writ of Error to the United States Circuit Court of Appeals for the Ninth Circuit in said cause and that a transcript of the record, proceedings, and papers on which said judgment was made and entered duly authenticated may be sent to the said Circuit Court of Appeals of the United States for the Ninth Circuit.

Walla Walla, Washington, January 2, 1909.

OTTO B. RUPP,
HERBERT C. BRYSON,
EVERETT J. SMITH,
Attorneys for Defendants.

(Endorsed:) No. 250. In the Circuit Court of the United States Southern Division of the Eastern District of Washington. The Board of Trustees of Whitman College, Plaintiffs, versus R. J. Berryman et al., Defendants. Petition for Writ of Error. Filed Jan. 12th, 1909. Frank C. Nash, Clerk, by E. E. Wright, Deputy. Otto B. Rupp, Herbert C. Bryson, Everett J. Smith, Solicitors and attorneys for Defendants in error. P. O. Address: Walla Walla, Washington.

In the Circuit Court of the United States for the Southern Division of the Eastern District of Washington.

THE BOARD OF TRUSTEES OF WHITMAN COLLEGE, Plaintiff,

vs.

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer; W. J. HONEYCUTT, Auditor, and J. H. Morrow, George Struthers and J. N. McCaw, County Commissioners, Constituting the Board of Equalization of Walla Walla County, Washington, Defendants.

Assignment of Error.

53 Come now the above named defendants in error, R. J. Berryman, Assessor, P. B. Hawley, Treasurer, W. J. Honeycutt, Auditor, and J. H. Morrow, George Struthers and J. N. McCaw, County Commissioners, Constituting the Board of Equalization of Walla Walla County, Washington, by Otto B. Rupp and Herbert C. Bryson, their attorneys and solicitors, and say, that in the record and proceedings in the above entitled cause, there is manifest error in this, to-wit:

1. The Circuit Court of the United States, Ninth Circuit, Southern Division of the Eastern District of Washington committed error in overruling the defendants' demurrer to the complaint of Plaintiff.

2. That the complaint in said cause and the matters therein contained are not sufficient in law for the said plaintiff to have or maintain its action as aforesaid against said defendants.

3. That by said record it appears that a judgment and decree pro

confesso was given in favor of the plaintiff when the demurrer interposed by the defendants should have been allowed.

4. That it appears by the plaintiff's own showing by the said Bill that it is not entitled to the relief prayed by said bill against these defendants, or any of them.

5. That it appears from said bill of complaint of the plaintiff that this court has no jurisdiction to hear and determine this action.

6. The amount involved in this controversy is Nine Hundred and forty-six and 32/100 dollars, which amount is not sufficient to give this court jurisdiction of this cause.

7. This court is denied jurisdiction herein and precluded from a hearing of this action for the reason that the bill of complaint is

54 brought to annul and enjoin the levy and collection by Walla Walla County, State of Washington, of a state tax upon the property of the plaintiff situate in said County and State, and no jurisdiction is conferred upon said court in such a case by the allegations in said bill.

8. That the said bill of complaint of the plaintiff is wholly without equity.

9. That all of said questions were raised specifically by the demurrer of the defendants, which said demurrer was wrongfully overruled by the trial judge in and for said circuit court.

Wherefore the said defendants, R. J. Berryman, Assessor, P. B. Hawley, Treasurer, W. J. Honeycutt, Auditor, and J. H. Morrow, George Struthers and J. N. McCaw, County Commissioners, constituting the Board of Equalization of Walla Walla County, Washington, pray that the judgment of the said Circuit Court of the United States for the Southern Division of the Eastern District of Washington be *and* in all things reversed.

OTTO B. RUPP,
HERBERT C. BRYSON,
EVERETT J. SMITH,
Counsel for Defendants in Error.

(Endorsed:) No. 250. In the Circuit Court of the United States, Southern Division of Eastern District of Washington. The Board of Trustees of Whitman College, plaintiffs, versus R. J. Berryman et al., defendants. Assignments of error. Filed Jan. 12th, 1909. Frank C. Nash, clerk, by E. E. Wright, deputy. Otto B. Rupp, Herbert C. Bryson, Everett J. Smith, solicitors and attorneys for defendants in error. P. O. address, Walla Walla, Washington.

In the Circuit Court of the United States for the Eastern District of Washington, Southern Division.

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No. 250.

THE BOARD OF TRUSTEES OF WHITMAN COLLEGE, Complainants,
vs.

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer, W. J. HONEYCUTT, Auditor, and J. H. MORROW, George Struthers, and J. N. McCaw, County Commissioners, Constituting the Board of Equalization of Walla Walla County, Washington, Defendants.

Order Allowing Appeal.

It is ordered that an appeal to the United States Circuit Court of appeals for the Ninth Judicial Circuit from the decree heretofore filed and entered herein be, and the same is, hereby allowed, and that a certified transcript of the record, and all proceedings herein upon which said decree was made, be forthwith transmitted to the said United States Circuit Court of Appeals.

And it is further ordered that the bond on appeal be, and the same is, hereby fixed at the sum of \$1000.00.

Dated at Spokane, Washington, this 12th day of January, A. D. 1909.

EDWARD WHITSON, *Judge.*

(Endorsed:) No. 250. In the Circuit Court of the United States for the Eastern District of Washington. The Board of Trustees of Whitman College vs. R. J. Berryman, Assessor, et al. Order allowing appeal. Filed January 12th, 1909. Frank C. Nash, clerk. By ———, deputy.

56 In the Circuit Court of the United States for the Southern Division of the Eastern District of Washington.

THE BOARD OF TRUSTEES OF WHITMAN COLLEGE, Plaintiffs,
vs.

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer; W. J. HONEYCUTT, Auditor, and J. H. MORROW, George Struthers, and J. N. McCaw, County Commissioners, Constituting the Board of Equalization of Walla Walla County, Washington, Defendants.

Citation.

UNITED STATES OF AMERICA, ss:

The President of the United States to the Board of Trustees of Whitman College, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at

the City of San Francisco, in the State of California, within 30 days from the date of this writ pursuant to an order allowing an appeal duly entered in the Clerk's office of the Circuit Court of the United States for the Eastern District of Washington, in that certain suit Numbered 250, in which R. J. Berryman, Assessor, P. B. Hawley, Treasurer, W. J. Honeycutt, Auditor, and J. H. Morrow, George Struthers and J. N. McCaw, County Commissioners, constituting the Board of Equalization of Walla Walla County, Washington, are defendants and appellants and you are respondents and appellees, to show cause, if any there be, why the decree rendered against the said complainants and appellants as in the said order allowing an appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America this 12th day of January, A. D. 1909.

[SEAL.]

EDWARD WHITSON, *Judge.*

Attest:

FRANK C. NASH,

Clerk U. S. Circuit Court,

Eastern Dist. of Washington.

Service of the within Citation and receipt of a copy thereof admitted this — day of January, A. D. 1909.

Solicitors for Respondent and Appellee in Lower Court.

57 (Endorsed:) No. —. In the Circuit Court of the United States for Eastern District of Washington. The Board of Trustees Whitman Col., plaintiffs, versus R. J. Berryman et al., defendants. Citation. Filed in the U. S. Circuit Court, Eastern Dist. of Washington. Jan. 12, 1909. Frank C. Nash, clerk. — — —, Dep. Rupp & Bryson, 414-415-416 Denny Bldg., Walla Walla, Washington, solicitors for defendants.

58 In the Circuit Court of the United States for the Southern Division of the Eastern District of Washington.

THE BOARD OF TRUSTEES OF WHITMAN COLLEGE, Plaintiff,

vs.

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer; W. J. HONEYCUTT, Auditor, and J. H. MORROW, George STRUTHERS, and J. N. McCaw, County Commissioners, Constituting the Board of Equalization of Walla Walla County, Washington, Defendants.

Bond on Appeal.

Know all men by these presents: That we, R. J. Berryman, Assessor, P. B. Hawley, Treasurer, W. J. Honeycutt, Auditor and J. H. Morrow, George Struthers and J. N. McCaw, County Commissioners

constituting the Board of Equalization of Walla Walla County, Washington, as officers of the County of Walla Walla, State of Washington, by J. N. McCaw, Auditor of said County, the same being a municipal corporation as principal, the Fidelity and Deposit Co. of Maryland, a corporation having its principal place of business in the City of Baltimore, *Md.* and State of Maryland, duly incorporated under the laws of said State for the purpose of making guaranteeing or becoming surety upon bonds or undertakings required or authorized by law and authorized by the insurance commissioner of the State of Washington as having complied with all of the requirements of the laws of said State of Washington, regulating the formation or admission of said corporation to transact such business in said State, as surety, are held and firmly bound unto the above named trustees of Whitman College, plaintiffs and respondents, in the penal sum of One Thousand Dollars (\$1,000) to be paid to the said Board of Trustees, for the payment of which well and truly to be made we bind ourselves, our and each of our heirs, executors, administrators and successors jointly and severally firmly by

59 these presents.

Sealed with our seals and dated this 15th day of January in the year of our Lord, 1909.

The condition of the above obligation is such that, whereas the above bounden R. J. Berryman, Assessor, P. B. Hawley, Treasurer, W. J. Honeycutt, Auditor and J. H. Morrow, George Struthers and J. N. McCaw, County Commissioners, constituting the Board of Equalization of Walla Walla County, Washington, have prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree in the above entitled suit by the Judge of the Circuit Court of the United States for the Ninth Circuit, Southern Division of the Eastern District of Washington.

Now, therefore, if the above named defendants and appellants shall prosecute said appeal to effect and answer all damages and costs if it shall fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

R. J. BERRYMAN, *Assessor;*

P. B. HAWLEY, *Treasurer;*

W. J. HONEYCUTT, *Auditor;*

J. H. MORROW, GEORGE STRUTHERS AND

J. N. McCAW,

*County Commissioners, Constituting the Board of
Equalization of Walla Walla County, Washington.*

By J. N. McCAW,

Auditor of Walla Walla County.

FIDELITY & DEPOSIT CO. OF MARYLAND,

By FRANK B. SHARPSTEIN,

Attorney in Fact.

[Seal Fidelity & Deposit Co.]

Attest:

M. H. PAXTON, *Agent.*

Sealed and delivered, taken and acknowledged this 15th day of January, 1909, before me the undersigned, a Notary Public in and for the County of Walla Walla and State of Washington.

EVERETT J. SMITH,
*Notary Public for Washington,
Residing at Walla Walla, Wash.*

The foregoing bond is approved this 19th day of January, 1909.

EDWARD WHITSON, *Judge.*

(Endorsed:) No. 250. Trustees Whitman College vs. R. J. Berryman et al. Bond on Appeal. Filed Jan. 20th, '09. F. C. Nash, Clerk, by E. E. Wright, Dep.

In the Circuit Court of the United States for the Eastern District of Washington, Southern Division.

THE BOARD OF TRUSTEES OF WHITMAN COLLEGE, Plaintiffs,
vs.

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer; W. J. HONEYCUTT, Auditor, and J. H. MORROW, George Struthers and J. N. McCaw, County Commissioners, Constituting the Board of Equalization of Walla Walla County, Washington, Defendants.

60 Come now the defendants, and respectfully petition the court to make and enter an order in the above entitled cause, vacating and setting aside its former order made and entered herein on the 12th day of January, 1909, allowing the appeal of said defendants to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree made and entered in said cause, and as grounds for this motion the defendants respectfully show the court and allege:

1. That the order allowing said appeal was made and entered in response to the petition of the defendants after the time allowed by law for the taking of such appeal had fully expired, and that such appeal would be inoperative and confer no jurisdiction upon said Circuit Court of Appeals to consider or determine the same.

2. That no citation on said appeal has been served upon any of the plaintiffs.

3. That no record of said cause of any nature has been filed in the said Circuit Court of Appeals.

Wherefore, the defendants pray the Court for an order vacating and setting aside the said order allowing said appeal, without prejudice to the rights of the defendants to seek such other appellate relief as they may be entitled to.

All of the above facts are shown by the records of said Court and cause, to which reference is hereby made.

EVERETT J. SMITH,
LESTER S. WILSON,
Attorneys for Defendants

(Endorsed:) No. 250. In the Circuit Court of the United States for the Eastern District of Washington, Southern Division. The Board of Trustees of Whitman College, Plaintiffs, vs. R. J. Berryman, et al. Defendants. Filed in the U. S. Circuit Court, Eastern Dist. of Washington. May 8, 1909. Frank C. Nash, Clerk, ——— Dep. Petition for Appeal. Service of papers in this case may be made upon Everett J. Smith, Walla Walla, Attorney for Defendant, at No. — Main Street, Room 20 Dooley Block, Walla Walla, Washington.

In the Circuit Court of the United States for the Eastern District of Washington, Southern Division.

THE BOARD OF TRUSTEES OF WHITMAN COLLEGE, Plaintiffs,

vs.

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer; W. J. HONEYCUTT, Auditor, and J. H. MORROW, George Struthers and J. N. McCaw, County Commissioners, Constituting the Board of Equalization of Walla Walla County, Washington, Defendants.

The above named defendants, conceiving themselves aggrieved by the decree made and entered on the 10th day of July, 1908, in the above entitled cause, do hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and pray that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the supreme Court of the United States.

EVERETT J. SMITH,

LESTER S. WILSON,

Attorneys for Defendants.

Dated this 8th day of May, 1909.

The foregoing claim of appeals is allowed.

EDWARD WHITSON, *Judge.*

Dated May 8, 1909.

(Endorsed:) In the Circuit Court of the United States for the Eastern District of Washington, Southern Division. The Board of Trustees of Whitman College, Plaintiffs, vs. R. J. Berryman, et al., Defendants. Filed in the U. S. Circuit Court, Eastern Dist. of Washington. May 8, 1909. Frank C. Nash, Clerk. Order Allowing Appeal. Service of papers in this case may be made upon Everett J. Smith Walla Walla Attorney for defendants at No. 2 Main Street, Room 20 Dooley Block, Walla Walla, Washington.

In the Circuit Court of the United States for the Eastern District of Washington, Southern Division.

BOARD OF TRUSTEES OF WHITMAN COLLEGE, Plaintiff,

vs.

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer; W. J. HONEYCUTT, Auditor, and J. H. MORROW, George Struthers and J. N. McCaw, County Commissioners, Constituting the Board of Equalization of Walla Walla County, Washington, Defendants.

The defendants pray an appeal from the final decree of this Court in the above entitled cause to the Supreme Court of the United States, and assign for error:

First. That the Court erred in holding that the amount in controversy, as shown by the bill of Complaint, exceeded the sum of two thousand dollars.

Second. The Court erred in holding that Section 6 of the Act of the Territorial legislature of the Territory of Washington, approved November 28, 1883, as set forth in paragraph III of the Bill of Complaint, was intended or designed to exempt perpetually from taxation all property of every nature which the trustees of Whitman College then owned or might at any time in the future acquire within the limits of said territory or within the limits of the State subsequently formed by such territory.

63 Third. That if the true intent and design of Section 6 of the Act of the Territory of Washington of November 28, 1883, was to perpetually exempt from taxation all property of every nature which Whitman College might then own or at any time in the future acquire within the limits of said territory, then the Court erred in holding that it was within the powers of said territorial legislature to bind, by such enactment, the state subsequently formed from such territory.

Fourth. The court erred in holding that the said Territorial Act of the Territory of Washington of November 28, 1883, constituted a contract for the perpetual immunity from taxation of all property which Whitman College then owned, or might thereafter acquire within the limits of said territory, which was binding upon the State subsequently formed from such territory; and in holding that the attempt of the defendants, as such proper revenue officers, to collect taxes upon the property described in the bill of complaint, in accordance with the general revenue laws of the State of Washington, constituted an impairment of the rights of said college in violation of section 10 of Article I of the constitution of the United States.

Fifth. The Court erred by including in its final decree an injunction forever enjoining the revenue officers of Walla Walla County from collecting taxes not only upon the property described in its bill of complaint situate in said county, but also all other property of any nature which it then owned or might at any time in the future acquire in said county.

Sixth. The Court erred in not sustaining the demurrer of the defendants to the bill of complaint—

(a) For want of equity exhibited by said bill;

(b) That the bill is brought to annul and enjoin the levy and collection by Walla Walla County, Washington of a state tax upon the property of plaintiff situate in said county and state, and the allegations of said bill are not sufficient to sustain the jurisdiction of said court.

(c) That the bill of complaint shows upon its face that the sum of nine hundred and forty-six and 32-100 dollars and no more is the amount in controversy herein.

Wherefore the defendants pray that the decree of said Circuit Court be reversed.

EVERETT J. SMITH,
LESTER S. WILSON,
Attorneys for Defendants.

(Endorsed): No. 250. In the Circuit Court of the United States for the Eastern *Division* District of Washington, Southern Division. The Board of Trustees of Whitman College, Plaintiffs, vs. R. J. Berryman et al., Defendants. Filed in the U. S. Circuit Court, Eastern Dist. of Washington, May 8 1909 Frank C. Nash Clerk, ———, Dep. Assignment of Errors. Service of papers in this case may be made upon Everett J. Smith, Walla Walla Attorney for Defendant at No. — Main Street, Room 20 Dooley Block Washington.

In the Circuit Court of The United States for the Eastern District of Washington, Southern Division.

THE BOARD OF TRUSTEES OF WHITMAN COLLEGE, Plaintiff,
vs.

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer; W. J. HONEYCUTT, Auditor; and J. H. MORROW, George Struthers, J. N. McCaw, County Commissioners, Constituting the Board of Equalization of Walla Walla County, Washington, Defendants.

Bond on Appeal.

Know all men by these presents: That we, R. J. Berryman, Assessor, P. B. Hawley, Treasurer, W. J. Honeycutt, Auditor, and J. H. Morrow, George Struthers and J. N. McCaw, County Commissioners, constituting the Board of Equalization of Walla Walla County Washington, as officers of the County of Walla Walla, State of Washington, by J. N. McCaw, Auditor of said County, the same being a municipal corporation as principal, and Fidelity and Deposit Co. of Maryland, a corporation having its principal place of business in the City of Baltimore and State of Maryland, duly incorporated under the laws of said state for the purpose of making guaranteeing or becoming surety upon bonds or undertakings required or authorized by law and authorized by

the Insurance commissioner of the State of Washington, as having complied *will* all the requirements of the laws of said State of Washington regulating the formation or admission of said corporations to transact such business in said State, as surety, are held and firmly bound unto the above named Trustees of Whitman College, plaintiffs and respondents, in the penal sum of two thousand dollars (\$2000) to be paid to the said Board of Trustees, for the payment of which well and truly to be made we bind ourselves, our and each of our heirs, executors, administrators and successors jointly and severally firmly by these presents.

Sealed with our seals and dated this 15th day of May in the year of our Lord, 1909.

The condition of the above obligation is such that whereas the above bounden R. J. Berryman, Assessor, P. B. Hawley, Treasurer, W. J. Honeycutt, Auditor and J. H. Morrow, George Struthers and J. N. McCaw, County Commissioners, constituting the Board of Equalization of Walla Walla County, Washington, having prosecuted an appeal to the Supreme Court of the United States to reverse the decree in the above entitled suit by the Judge of the Circuit Court of the United States for the Ninth Circuit, Southern Division of the Eastern District of Washington.

Now, therefore, if the above named defendants and appellants shall prosecute said appeal to effect and answer all damages and costs if it shall fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

R. J. BERRYMAN, *Assessor*;
P. B. HAWLEY, *Treasurer*;
W. J. HONEYCUTT, *Auditor*;
J. H. MORROW,
GEORGE STRUTHERS AND
J. N. McCAW,

*County Commissioners Constituting the Board of
Equalization of Walla Walla County, Washington,*
By J. N. McCAW,

Auditor of Walla Walla County.

[SEAL.]

FIDELITY & DEPOSIT COMPANY,
OF MARYLAND,

By F. B. SHARPSTEIN, *Att'y in Fact.*

Attest:

W. R. PAXTON, *Agent.*

Sealed and delivered, taken and acknowledged this 15th day of January, 1909, before me, the undersigned, a Notary Public in and for the County of Walla Walla and State of Washington.

[SEAL.]

EVERETT J. SMITH,
Notary Public for Washington,
Residing at Walla Walla, Wash.

The foregoing bond is approved this 17 day of May, 1909.

EDWARD WHITSON, *Judge.*

(Endorsed): No. 250. In the Circuit Court of the United States for the eastern District of Washington, Southern Division. The Board of Trustees of Whitman College, Plaintiffs, vs. R. J. Berryman, et al., Defendants. Bond. Filed in the U. S. Circuit Court, Eastern Dist. of Washington, May 17 1909 Frank C. Nash Clerk.
 — — —, Dep.

In the Circuit Court of the United States for the Eastern District of Washington, Southern Division.

THE BOARD OF TRUSTEES OF WHITMAN COLLEGE, Plaintiffs,
 vs.

67 R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer; W. J. Honeycutt, Auditor; and J. H. Morrow, George Struthers, and J. N. McCaw, County Commissioners, Constituting the Board of Equalization of Walla Walla County, Washington, Defendants.

Præcipe for Transcript of the Record on Appeal.

To the Clerk of the above-entitled Court:

You will please make transcript of the record for use on appeal in the above entitled suit as follows:

Appearance of attorneys for complainant.

Appearance of Lester S. Wilson for Defendants.

Appearance of Otto B. Rupp for Defendants.

Appearance of Everett J. Smith for defendants.

Bill of complaint. Præcipe for Subpœna. Subpœna. Demurrer of Defendants. Stipulation. Opinion overruling Defendants' demurrer. Order to take bill as confessed. Decree pro confesso. Petition and order allowing appeal. Assignment of error. Citation. (Original) Bond on appeal. Names and addresses of counsel.

LESTER S. WILSON,
 EVERETT J. SMITH,

Attorneys for Defendants and Appellants.

(Endorsed): No. 250. In the Circuit Court of the United States for the Eastern *Division* District of Washington, Southern Division. The Board of Trustees of Whitman College, Plaintiffs, vs. R. J. Berryman et al., Defendants. Præcipe. Filed June 1-09 F. C. Nash Clerk By E. E. Wright Dep. Service of papers in this case may be made upon Everett J. Smith.

68 In the Circuit Court of the United States for the Eastern District of Washington, Southern Division.

BOARD OF TRUSTEES OF WHITMAN COLLEGE, Plaintiff,

vs.

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer; W. J. HONEYCUTT, Auditor and J. H. MORROW, George Struthers, and J. N. McCaw, County Commissioners, Constituting the Board of Equalization of Walla Walla County, Washington, Defendants.

It is hereby stipulated between the plaintiff and the defendants that an appeal from the final judgment and decree made and entered in the above entitled court and cause on the 10th day of July, 1908, to the United States Circuit court of Appeals for the Ninth Circuit was inadvertantly taken and allowed by the Judge of the above entitled court more than six months after the making and entry of such final judgment and decree; and for such reason said appeal was and is abortive and ineffective for any purpose; that no citation was ever served upon the plaintiff on such appeal; that the petition of the defendants to the said United States Circuit Court of Appeals, supported by the mutual stipulation of all parties in this cause in that behalf, for the formal dismissal of said appeal, without prejudice to the rights of the defendants to invoke such other appellate relief from said final judgment and decree as they may by law be entitled to, is now pending therein, and that the same should and will be dismissed in due course and that the parties hereto make and enter into this stipulation for the purpose of explaining the presence in the record on the appeal of said cause to the Supreme Court of the United States of said petition for appeal to the said United States Circuit Court of Appeals, and its allowance as aforesaid by the Judge of the above entitled court.

W. T. DOVELL,

Of Attorneys for Plaintiff.

LESTER S. WILSON,

EVERETT J. SMITH,

Attorneys for Defendants.

(Endorsed): 250. Board of Trustees of Whitman College vs. R. J. Berryman, Assessor, et al., Stipulation. Filed June 25th 1909 Frank C. Nash Clerk, By E. E. Wright Dep.

69 In the Circuit Court of the United States for the Eastern District of Washington, Southern Division.

No. 250.

THE BOARD OF TRUSTEES OF WHITMAN COLLEGE, Complainants,
vs.

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer; W. J. HONER-
cutt, Auditor, and J. H. Morrow, George Struthers, and J. N.
McCaw, County Commissioners, Constituting the Board of Equal-
ization of Walla Walla County, Washington, Defendants.

Clerk's Certificate to the Transcript of the Record on Appeal.

UNITED STATES OF AMERICA,
Eastern District of Washington, State of Washington, ss:

I, Frank C. Nash, Clerk of the Circuit court of the United States for the Eastern District of Washington, do hereby certify that the foregoing typewritten pages numbered from one to 69, inclusive, constitute and is a true and complete copy of the entire record and proceedings in the above entitled cause, as the same remain of record and on file in the office of the Clerk of the above entitled court, and that the same constitutes my return to the order allowing an appeal to the Supreme Court of the United States of America from the decree of the Circuit Court of the United States for the Eastern District of Washington, Southern Division, which order allowing said appeal was lodged and filed in my office on the 8th day of May, 1909.

And I hereby annex to said record the original Writ of Citation issued and filed in said cause.

And I further certify that the cost of preparing this transcript on appeal amounts to the sum of \$59.50 which sum has been paid in full by the appellant and defendants.

In Testimony whereof I have hereunto set my hand and affixed the seal of said Circuit Court, at Walla Walla, Washington, in said District, in the Ninth Circuit, this 26th day of June, 1909, and the Independence of the United States of America, the One-Hundred and thirty-third.

[Seal of the United States Circuit Court, Eastern District
of Washington.]

FRANK C. NASH, Clerk,
By E. E. WRIGHT, Deputy.

70

Return on Service of Writ.

UNITED STATES OF AMERICA,
Eastern District of Washington, ss:

I hereby certify and return that I served the annexed Citation on George Turner, Esq., Solicitor for the therein-named appellee by handing to and leaving a true and correct copy thereof with him, personally, at Spokane, Wash., in said District on the 17th day of May, A. D. 1909.

GEO. H. BAKER,
U. S. Marshal,
 By CHARLES P. PRAY,
Deputy.

Fees:	
Service	\$2.00
1 mi. @ 6¢06
	<hr/> \$2.06

71 In the Circuit Court of the United States for the Eastern District of Washington, Southern Division.

BOARD OF TRUSTEES OF WHITMAN COLLEGE, Plaintiff,
 vs.

R. J. BERRYMAN, Assessor; P. B. HAWLEY, Treasurer; W. J. HONEYCUTT, Auditor, and J. H. MORROW, George Struthers, and J. N. McCaw, County Commissioners, Constituting the Board of Equalization of Walla Walla County, Washington, Defendants.

THE UNITED STATES OF AMERICA, ss:

The President of the United States to the Board of Trustees of Whitman College, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at the city of Washington, within sixty days from the date of this writ, pursuant to an appeal, duly allowed by the Circuit Court of the United States for the Eastern District of Washington, Southern Division, and filed in the Clerk's office of said court on the 8th day of May, 1909, in a cause wherein R. J. Berryman, assessor, P. B. Hawley, treasurer, W. J. Honeycutt, Auditor and J. H. Morrow, George Struthers and J. N. McCaw, County Commissioners constituting the Board of Equalization of Walla Walla County, State of Washington are appellants, and you are the appellee, to show cause, if any, why the decree rendered against the said appellants as in the said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 17 day of May, in the year of our Lord, one thousand nine hundred and nine.

[Seal of the United States Circuit Court, Eastern District of Washington.]

EDWARD WHITSON, *Judge.*

Attest:

FRANK C. NASH,
*Clerk, U. S. Circuit Court,
Eastern Dist. of Washington.*

Received copy and acknowledged service of within citation this — day of May, 1909.

_____,
Attorneys for Appellees.

72 [Endorsed:] Original. No. 250. In the Circuit Court of the United States for the Eastern District of Washington, Southern Division. The Board of Trustees of Whitman College, Plaintiffs, vs. R. J. Berryman, et al., Defendants. Citation. Service of papers may be made upon Everett J. Smith, Attorney for Defendants. Walla Walla, Washington. Room 20 Dooly Bldg. Filed in the U. S. Circuit Court, Eastern Dist. of Washington, May 17, 1909. Frank C. Nash, Clerk. Marshal's Docket No. 389. Civ. D. P. 98.

Endorsed on cover: File No. 21,759. E. Washington C. C. U. S. Term No. 533. R. J. Berryman, assessor; P. B. Hawley, treasurer; W. J. Honeycutt, auditor, et al., appellants, vs. The Board of Trustees of Whitman College. Filed July 19th, 1909. File No. 21,759.

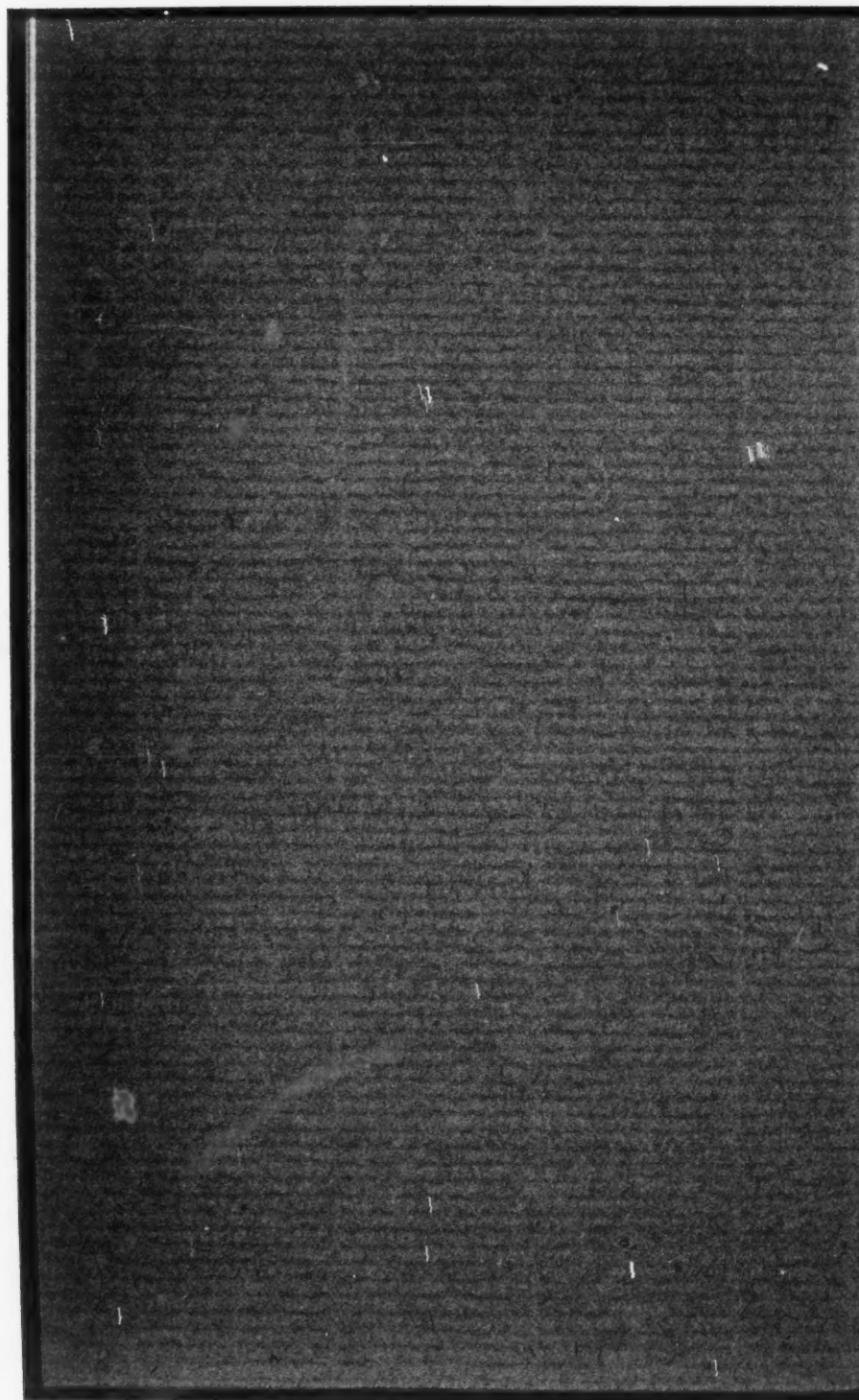
In the Supreme Court of the United States
October Term, 1909

No. 100

R. J. BERRYMAN, Appellant, v. R. E. HAWLEY, Trustee,
W. J. KOREVCHET, Receiver, and J. E. WILSON,
JAMES STRICKLAND and J. E. MALLIN, Trustees,
Deeds, constituting the Board of Supervisors of
Wash. State Penit. Institution, Washington.

BOARD OF TRUSTEES OF WASHINGTON COLLEGE

DEEDS OF APPELLANTS



In the Supreme Court of the United States

October Term, 1909.

No. _____

R. J. BERRYMAN, Assessor; P. B. HAWLEY,
Treasurer; W. J. HONEYCUTT, Auditor, and
J. H. MORROW, GEORGE STRUTHERS and
J. N. McCRAW, Commissioners, constituting the
Board of Equalization of Walla Walla County,
Washington,

Appellants,

vs.

BOARD OF TRUSTEES OF WHITMAN COLLEGE.

BRIEF OF APPELLANTS

I.

Statement of the Case.

This suit was commenced by the appellee, the Board of Trustees of Whitman College, in the Circuit Court of the United States for the District of

Washington, Southern Division, to enjoin the collection of a general tax for the year 1906, aggregating the sum of \$946.32, levied upon certain specific tracts of land described in the complaint, owned by the college, situate in Walla Walla County, State of Washington, and is directed against the appellants as the regular taxing and revenue officers of said county.

The appellee bases its right to relief from this tax upon a private statute passed by the Legislature of Washington Territory in 1883, claimed by appellee to constitute a valid contract of perpetual exemption from taxation of all property of Whitman College.

The complaint as originally filed (record, p. 1), shows the following summarized facts:

On December 20, 1859, the Legislature of Washington Territory enacted a private law incorporating Whitman Seminary, in Walla Walla County, in said Territory, and designated nine persons therein named to be a body politic and corporate, in law, by the name and style of the President and Trustees of Whitman Seminary. The full text of the law is copied in the complaint (record, p. 2).

By the terms of the law, the corporation was to have perpetual succession, with power to acquire, hold and sell real, personal and mixed property, together with all other general powers incident thereto, and with the further power to "exercise all the powers and enjoy all the privileges of other institutions of learning in this territory." Section 6 of the act reads:

“That the capital stock of said institution shall never exceed one hundred and fifty thousand dollars, nor the income or profits of the same be appropriated to any other use than for the benefit of said institution as contemplated by this act.”

That the provisions of said act were accepted by the persons named therein as trustees of Whitman Seminary; that they established an institution of learning in Walla Walla county as contemplated by the act; and thereafter conducted and maintained the same in compliance therewith, and that such Board of Trustees acquired by contribution from various persons and otherwise, a large amount of real and personal property in the Territory of Washington, which, with its revenue and income was at all times devoted to the objects for which the institution was incorporated.

It is further shown, that 23 years after its incorporation, and on the 20th day of November, 1883, the identical nine persons to whom the original charter had been issued, being desirous of enlarging the scope of the institution, and for the purpose of securing further voluntary contributions for said objects, *obtained* from the Legislature of Washington Territory an amendment of said charter, the act amending the same being copied in full in the complaint (record, p. 4), Section 6 as amended, upon which appellee relies, reads as follows:

“That the property of said Board of Trustees of Whitman College, including all income and proceeds, shall be used exclusively for the purpose of education, and in consideration of said use, said property shall not be subject to taxation.”

The acceptance of the grant is alleged, and that in pursuance thereof, and particularly the clause exempting its property from taxation, the Board of Trustees of Whitman Seminary transferred to the Board of Trustees of Whitman College all the property which had been acquired by and was then held by said persons as trustees; that said corporation has acquired by purchase, donation, devise and otherwise, real and personal property of great value, and that the same and its income has at all times been used for the purpose of education; that a large number of persons, relying upon the grant of the amended act, and more especially on that clause of it exempting the property of Whitman College from taxation, have by gift, devise and bequest, given and granted to said Board of Trustees a large amount of real and personal property situate in the County of Walla Walla, and other counties in the State of Washington for such educational purposes; and that unless the provision of said amendatory act exempting its property from taxation be regarded by the State of Washington, it will be impossible for the said Board of Trustees of Whitman College to secure further voluntary contributions for the support and conduct of said institution, and that its scope and usefulness will be greatly abridged.

The complaint then recites the various steps taken in transforming the Territory of Washington into a State, by the Enabling Act of Congress of February 22, 1889, the adoption by the inhabitants of a State Constitution, and the admission of the State

into the Union by Proclamation of the President on November 11th, 1889. It also recites the various provisions of such state Constitution, and of the State laws, providing for the uniform taxation of property not exempt, and alleges that under the provisions thereof, the plaintiffs in error as the revenue officers of Walla Walla County, have levied, extended on the tax rolls, and unless enjoined by the Court will attempt to collect a general tax on the specific property described in the complaint for the year 1906, aggregating \$946.32, and will thereafter levy taxes on all of its property in said county; and that if said taxes are not paid, delinquent tax certificates will issue thereon, which will create a cloud upon the title thereto, and that a multiplicity of suits will result on account thereof.

There are included in the complaint allegations that the Territorial Act as amended constituted a valid and binding contract between the Territory of Washington and the Board of Trustees of Whitman College which could not be abrogated without the consent of the latter; and that the action and threatened action of the plaintiffs in error as such revenue officers, and the laws of the State of Washington under which they justify their said action, constitute an impairment of the rights of appellees under Section 10, of Article I of the Constitution of the United States, in that it is an attempt by the State, without the consent of the Board of Trustees of Whitman College, to impair, abrogate and set at naught such contract.

The intended scope of the suit, beyond the specific tax of \$946.32 directly attacked, is shown by allegations that under the Territorial statute, all property of the college is exempt from taxation; and—

“That if taxes are levied upon the property of said Board of Trustees of Whitman College as aforesaid, and collection thereof is enforced, as it is hereinbefore set forth collection thereof will be attempted to be enforced by said defendants unless restrained by order of this Court, the said Board of Trustees of Whitman College will be compelled to pay as taxes upon its property aforesaid, *annually*, a large sum, to-wit, a sum in excess of \$2,500.00.”

“That the matter in dispute herein exceeds, exclusive of interest and costs, the sum or value of \$2,000.00.”

The original prayer for relief (record, p. 12), is that the appellants, as the taxing and revenue officers of Walla Walla County, “be restrained and enjoined from listing for taxation, or including upon the tax rolls of said county any of the property, real or personal, hereinbefore described, or any of the property, real or personal, belonging to the said Board of Trustees of Whitman College, and that they and each of them be restrained and enjoined from attempting to collect or enforce, or in any way taking proceedings looking to the collection or enforcement of taxes upon any of the property, real or personal, belonging to the said Board of Trustees of Whitman College.”

After the filing of the original bill, the same was amended by stipulation (record, p. 18), so as to contain the additional allegations that the defendants,

notwithstanding the premises, assert that all property, real and personal of the college in the complaint described, is subject to taxation, and that unless restrained by the Court the defendants will from year to year list the same for taxation, and unless such taxes are paid or restrained by order of the Court, certificates of delinquency will be issued, thereby constituting a cloud upon the title thereto, and thereby and by the issuance thereof will cause a multiplicity of suits for the enforcement thereof; and then in order that there may be no uncertainty as to the relief desired, it is alleged—

“And this complainant asserts, and by this action seeks to enforce a right perpetual to the exemption of taxation of all the property, real and personal, of said complainant.”

The stipulation further amends the bill by showing that the real estate therein described is and at all of the times therein mentioned was of the value of ten thousand dollars and upwards, and that all of the same was acquired by the appellee since the date of the admission of the State of Washington into the Union as thereinbefore set forth.

The stipulation contains the further provision that none of the real estate described in the complaint is occupied by any buildings, campus or other improvements used in connection with said college, but that the income and proceeds of said property and the whole thereof is used exclusively by said college for the purpose of education.

There is added to paragraph 3 of the prayer of the bill—"And to be perpetually exempt from taxation under the laws of the State of Washington."

Demurrer of Appellants.

The appellants filed a demurrer to the complaint as amended by the stipulation, upon the following grounds: (Record, p. 16.)

1. That it appears by the plaintiff's own showing by the said bill that it is not entitled to the relief prayed by said bill against these defendants or any of them.

2. That it appears from said bill of complaint of the plaintiff that this Court has no jurisdiction to hear and determine this action;

(a) The amount involved in this controversy is \$946.32, which amount is not sufficient to give this Court jurisdiction of this cause.

(b) This Court is denied jurisdiction herein and precluded from a hearing of this action for the reason that the bill of complaint is brought to annul and enjoin the levy and collection by Walla Walla County, State of Washington, of a state tax upon the property of the plaintiff situate in said county and state, and no jurisdiction is conferred upon said Court in such a case by the allegations in said bill.

3. That the said bill of complaint of the plaintiff is wholly without equity.

The demurrer of the appellants was overruled (record, p. 19), and thereupon, appellants declining

to plead further to the bill, a decree *pro confesso* was entered in the cause, granting to appellees the full relief prayed for (record, p. 32), enjoining the appellants and their successors from taking any steps to place upon the tax rolls, listing for taxation, or in any way taking proceedings looking to the collection or enforcement of taxes upon any of the property, real or personal, belonging to the Board of Trustees of Whitman College; and further decreeing "that all the property, real and personal of the said Board of Trustees of Whitman College is not taxable."

With their petition for the allowance of this appeal, the appellants presented the following assignments of error (record, pp. 40-41), which are the errors intended to be urged upon this appeal:

First. That the Court erred in holding that the amount in controversy, as shown by the bill of complaint, exceeded the sum of two thousand dollars.

Second. The Court erred in holding that Section 6 of the Act of the Territorial Legislature of the Territory of Washington, approved November 28, 1883, as set forth in Paragraph III of the bill of complaint, was intended or designed to exempt perpetually from taxation all property of every nature which the trustees of Whitman College then owned or might at any time in the future acquire within the limits of said territory or within the limits of the state subsequently formed from such territory.

Third. That if the true intent and design of Section 6 of the Act of the Territory of Washing-

ton of November 28, 1883, was to pereptually exempt from taxation all property of every nature which Whitman College might then own or at any time in the future acquire within the limits of said territory, then the Court erred in holding that it was within the powers of said territorial legislature to bind, by such enactment, the state subsequently formed from such territory.

Fourth. The Court erred in holding that the said Territorial Act of the Territory of Washington of November 28, 1883, constituted a contract for the perpetual immunity from taxation of all property which Whitman College then owned, or might thereafter acquire within the limits of said territory, which was binding upon the state subsequently formed from such territory; and in holding that the attempt of the defendants, as such proper revenue officers, to collect taxes upon the property described in the bill of complaint, in accordance with the general revenue laws of the State of Washington, constituted an impairment of the rights of said college in violation of Section 10 of Article I of the Constitution of the United States.

Fifth. The Court erred by including in its final decree an injunction forever enjoining the revenue officers of Walla Walla County from collecting taxes not only upon the property described in its bill of complaint situate in said county, but also all other property of any nature which it then owned or might at any time in the future acquire in said county.

Sixth. The Court erred in not sustaining the demurrer of the defendants to the bill of complaint,—

(a) For want of equity exhibited by said bill;

(b) That the bill is brought to annul and enjoin the levy and collection by Walla Walla County, Washington, of a state tax upon the property of plaintiff situate in said county and state, and the allegations of said bill are not sufficient to sustain the jurisdiction of said Court.

(c) That the bill of complaint shows upon its face that the sum of nine hundred and forty-six and 32-100 dollars and no more is the amount in controversy herein.

The Amount in Controversy Is \$946.32 and No More.

The first assignment of error takes issue with the holding of the Court that the amount in controversy in this suit is more than \$2,000.

The only specific tax on the property of the college which was levied and in process of collection, and which was sought to be enjoined in the suit, aggregated the sum of \$946.32 and no more. In arriving at the jurisdictional amount, two other contentions urged in the complaint were considered, viz.:

The anticipated taxation of the property of the college for future years; and—

The value to the college of the right of perpetual exemption from taxation of all of its property which it now or at any time in the future may own.

As to the first contention, this Court has uniformly held that the effect on future taxation of a decision that the particular taxation is invalid, cannot be availed of to add to the sum or value of the matter in dispute.

Holt vs. Indiana Manufacturing Co., 176 U. S., 68.

Clay Center vs. Farmers L. & T. Co., 145 U. S., 224.

New England Mortgage Security Co. vs. Gay, 145 U. S., 123.

Citizens Bank vs. Cannon, 164 U. S., 319.

Rude vs. Westcott, 130 U. S., 152.

Walter vs. Northeastern Railroad, 147 U. S., 370.

The opinion of the Circuit Court (record, pp. 20-21), practically holds that the question of *future taxation* may not be considered, but does hold that the value to the college of a right of *perpetual exemption*, as set forth in the complaint, should be considered in arriving at the amount in controversy. Upon this point the Court says: (Record, p. 21.)

“The correct solution of the question turns upon what is in dispute here; whether it is the taxes now assessed, and which may in the future be assessed, or whether it is the right to be exempt from taxation pursuant to the terms of the statute. That the Supreme Court had in mind a distinction in this regard is disclosed by reference to *Citizens Bank vs. Cannon*, *supra*, where this language was used:

“‘It is further argued that jurisdiction may be seen in the averment of the bill that the value of the

exemption of the bank's property during the continuance of its charter exceeds \$2,000 for each parish. But the answer to this is that this is not a suit to exempt property from taxation permanently. The purpose of the bill is to restrain certain tax assessors and tax collectors from collecting taxes for specific years, and, if the amount of such taxes does not confer jurisdiction, it is, from the nature of things, impossible for a Court to foresee what, if any taxes may be assessed for future years.' "

The Court thereupon held (record, p. 24), that the allegations as to the right of perpetual exemption from taxation in the complaint, coupled with the allegation that the amount in controversy exceeds \$2,000, is sufficient to sustain the jurisdiction.

The complaint in the above case of *Citizens Bank vs. Cannon*, indicates from the foregoing quotation, that it contained just as vital allegations showing its right to perpetual exemption from taxation, as does the case at bar. The only difference between the two cases is, that the prayer for relief in the case cited does not ask for exemption "permanently," and the bill is not specifically labeled as a suit to perpetually exempt property from taxation. It goes without saying that its object of permanent relief would be accomplished by the decision of a Court of last resort that the exemption law relied on constituted a valid and binding contract for such exemption, and that the taxes for any certain year were invalid by reason thereof.

The same is true of the case at bar. The prayer for a perpetual injunction against future taxation is

superfluous, and is evidently made in aid of the jurisdictional amount.

This Court, in the case of *Brown vs. Trousdale*, 138, U. S., 389, says in speaking of the amount in controversy:

“The main question at issue was the validity of the bonds, and that involved the levy and collection of taxes for a series of years to pay interest thereon, and finally the principal thereof, and not the mere restraining of the tax for a single year. * * * *
For although as to the tax for the particular year, the injunction sought might restrain only the amount levied against each, that order was but preliminary, and was not the main purpose of the bill, but only incidental.”

In the above case, the injunction was sought against taxes levied for the specific purpose of paying the interest on bonds alleged to be unlawful and outstanding, and to have the specific series of bonds declared to be invalid. The case and cases of similar import through the books are widely different, and involve different property rights than the question of the right of exemption from future general taxation under general state revenue laws, which, as is said in *Citizens Bank vs. Cannon*, may or may not be levied.

“By matter in dispute is meant the subject of litigation, the matter upon which the action is brought and issue is joined, and in relation to which, if the issue be one of fact, testimony is taken.”

Smith vs. Adams, 130 U. S., 167.

The allegation that the amount in controversy is

more than \$2,000 is a mere conclusion, and has no weight as against the specific allegations of the bill, failing to show such amount.

Fishback vs. W. U. T. Co., 161 U. S., 26.

The right claimed by Whitman College of perpetual exemption from taxation of property now owned by it, and of property which it may hereafter acquire, is purely conjectural. The bill shows that its property is scattered all over the state. It may or may not own a dollar's worth of property in Walla Walla County at any given time. So far as Walla Walla County is concerned, the value of a right of perpetual exemption from taxation cannot be estimated in money.

"The jurisdiction conferred by Congress upon any Court of the United States of suits at law or in equity in which the matter in dispute exceeds the sum or value of a certain number of dollars, includes no case in which the right of neither party is capable of being valued in money."

Kurtz vs. Moffitt, 115 U. S., 487.

The probative effect of the decree upon the taxing officers of other counties in the state might be of value; but the uniform decisions of this Court above cited, prohibit its consideration in computing the value of the matter in controversy.

In *Holt vs. Indiana Mfg. Co.*, 176 U. S., 68, the complaint stated facts sufficient to show a right to perpetual exemption from taxation. This Court dismissed the appeal on the ground that the particular

taxes sought to be enjoined were less than \$2,000. In that case as well as in *Citizens Bank vs. Cannon*, 164 U. S., 319, with an added prayer for a perpetual injunction, they would have been exactly similar to the case at bar.

Under numerous decisions of this Court the sum or value of the amount in controversy in this case may not be made up by a computation of the abstract rights of appellee to exemption from taxation upon whatever property, if any, it may at any time in the future own.

“The matter in dispute, in its relation to jurisdiction, is the particular taxes attacked, and unaccrued or unspecified taxes cannot be included upon conjecture to make up the amount.”

Washington & G. R. Co. vs. District of Columbia, 146 U. S., 227.

The value attached by appelle to its alleged right of perpetual immunity from state taxation of whatever property it may hereafter own, is purely conjectural. In actual effect, it amounts to relief from “future taxation,” which the Court has emphatically decided may not be considered.

We submit that the prayer for a perpetual injunction against future taxation does not strengthen or add to the value of the matter in dispute, and that it is \$946.32 and no more.

II.

**The Washington Territorial Exemption Act Was Not
Intended to Bind the State Thereafter to Be
Formed.**

The exemption clause of the Territorial Act relied on, requires the property of the college to be used for the purpose of "education," and that—"in consideration of said use, said property shall not be subject to taxation."

In construing this exemption clause, this Court will be guided by its well established rule of strict construction of statutes exempting property from general taxation.

"The taxing power of the state is never presumed to be relinquished, and it exists unless the intention to relinquish it is declared in clear and unambiguous terms, admitting of no other reasonable construction."

Southwestern R. Co. vs. Wright, 116 U. S.,
231.

The Court will not construe this territorial exemption law so broadly as it would construe the same law if it were made by a state with unrestricted legislative powers in that behalf. Territorial governments cannot be presumed where a state would be, to have intended to bind, by a territorial legislative act, states thereafter to be formed from them, in such sweeping and vital matters as to perpetually exempt from taxation all property which a private corporation may at any time acquire, within its borders.

Granted, as stated by the Court, that the building up of a large educational institution in the Territory of Washington in 1883 was, as it is in all other sparsely territories, fraught with difficulty. (Record, p. 26.)

Granted further, that the Territorial Legislature had every desire to single out and aid this especial college, beyond the privileges accorded by the general territorial laws to like institutions of learning in the territory.

This Court could as consistently read into the exemption act relied on the intention of the territory while it remained such, to waive its right of taxation of the property of Whitman College, as it could read into it an intention, against positive prohibitions of law hereinafter cited, to create a contract of perpetual exemption from taxation which should be binding upon the state soon to be formed.

III—IV.

Regardless of the Intent of the Territorial Legislature, the Exemption Act Was Void, and Did Not Constitute a Contract for Perpetual Exemption From Taxation.

If the Court shall hold that the words of exemption in Section 6 of the act amending the charter of the college are sufficient to show an intention of the Territorial Legislature to perpetually exempt its property from taxation, then such attempt to do so was void.

First. The Territorial Legislature was directly prohibited from granting such exemption by the Organic Act of Congress creating Washington Territory, being Section 1924, Revised Statutes U. S. On matters of taxation in the Territory, that section provides:

“In addition to the restrictions upon the legislative power of the Territory, * * * all taxes shall be equal and uniform.”

The Territorial Legislature recognized and obeyed this Congressional requirement when in 1859 it granted to Whitman Seminary only such rights and privileges as were accorded to other like institutions of learning in the territory.

When the Territorial Legislature singled out this especial college and enacted a law that its property should be exempt from taxation, it showed a partiality and discrimination which was violative of the rule of both equality and uniformity, required by Section 1924 Revised Statutes U. S.

Edye vs. Robertson, 112 U. S., 580.

Pollock vs. Farmers L. & T. Co., 157 U. S., 593.

Pollock vs. Farmers L. & T. Co., 158 U. S., 694.

“It is difficult to conceive of a justifiable exemption law which should select single individuals or corporations, or single articles of property, and taking them out of the class to which they belong, make them the subject of capricious legislative favor. Such favoritism could make no pretense to equality; it

would lack the semblance of legitimate tax legislation."

Cooley on Taxation (1903 Ed.), p. 381.

The requirement of uniformity in taxation refers to property or persons of the same class. It requires the rate to be uniform on the same class everywhere, with all people and at all times.

State vs. Whittlesey, 17 Wash., 447.

Miller, Constitution of the United States, p. 241.

Second. The Territorial grant of exemption was an "especial privilege," within the meaning of the amendment to the Organic Act of Congress relating to Territories, of March 2, 1867, being Section 1889, Revised Statutes U. S., reading as follows:

"That the legislative assemblies of the several territories of the United States shall not, after the passage of this act, grant private charters or especial privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate, for mining, manufacturing and other industrial pursuits, or the construction or operation of railroads, wagon roads, irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any benevolent, charitable or scientific association."

State of New Jersey vs. Henry Wright, 117 U. S., 648.

Morgan vs. Louisiana, 93 U. S., 217.

Wilson vs. Gaines, 103 U. S., 417.

Chesapeake & Ohio R. Co. vs. Miller, 114 U. S., 176.

Memphis & Little Rock R. Co. vs. Berry, 112
U. S., 609.

This Court has held, in the case of *New Jersey vs. Wright* above cited, and in the cases cited therewith, that exemption from taxation is a "special privilege," a "personal privilege," and has used other like terms to indicate persons and corporations who are exempt from taxation by special statutes.

The Court below, in holding that Section 1889, Revised Statutes above quoted, did not prohibit the granting of immunity from taxation by Territorial Legislatures (record, pp. 26-27), cites as authorities the cases of *Phoenix Insurance Co. vs. Tennessee*, 161 U. S., 174; and *Pickard vs. Tennessee Etc. R. Co.*, 130 U. S., 642; but both of these cases are squarely in line with the cases next above cited by appellants herein; and they all simply decide that immunity from taxation is a personal, or an especial privilege, not extending beyond the immediate grantee, unless otherwise so declared in express terms.

In citing the above case of *Pickard vs. Tennessee Etc. R. Co.*, *supra*, the lower court quotes therefrom (record, p. 27), the statement that—

"The term 'privileges' does not include immunity from taxation unless the other provisions of the act give such meaning to it."

This holding is based upon the very principle for which appellants contend, that immunity from taxation is an especial privilege, and may not be conveyed under a deed granting to a company all the property,

franchises and privileges of a corporation entitled to the immunity from taxation. We quote from the decision :

“Yielding to the doctrine that immunity from taxation may be granted, that point being already adjudged, it must be considered as a personal privilege, not extending beyond the immediate grantee, unless otherwise so declared in express terms. The same considerations which call for clear and unambiguous language to justify the conclusion that immunity from taxation has been granted in any instance, must require similar distinctness of expression before the immunity will be extended to others than the original grantee. It will not pass merely by a conveyance of the property and franchises of a railroad company, although such company may hold its property exempt from taxation. As we said in *Morgan vs. Louisiana*, 93 U. S., 217, 223: ‘The franchises of a railroad corporation are rights or privileges which are essential to the operation of the corporation, and without which its road and works would be of little value, such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, and incapable of transfer without express statutory direction.’ ”

It may well be, as stated in the opinion of the Court below, that the term “especial privileges” had reference to many other things besides immunity from taxation; but appellants submit, that to single out one corporation in a territory from the class to which it belonged, and exempt its property from taxation by private statute, cannot but be a special privi-

lege, a special mark of discrimination and partiality, which the Federal statute specially prohibits Territories from enacting, no matter what other subjects it was designed to cover.

It will also be noticed that the Federal Statute, after prohibiting the Territorial Legislatures from granting private charters or especial privileges, expressly consents that colleges and seminaries may be instituted under general incorporation acts, which must preclude and prohibit a Territorial Legislature from specially incorporating a college by private act, and granting it immunity from taxation.

In this connection, a comparison of the private act incorporating Whitman Seminary in 1859, with the private act incorporating Whitman College in 1883, will show the corporations thereby created, to be practically two distinct entities. In the latter act the name of the corporation is changed, its objects are changed; the trustees of the original corporation convey to the new corporation the property which the former had acquired, and generally the latter act amounted to at least a private re-incorporation, repugnant to the spirit of the Federal statute, and repugnant to both the letter and the spirit of the statute as to its grant of immunity from taxation.

"A Territorial Law Passed in Violation of the Positive Prohibition of Congress Is Void."

Clayton vs. People of Utah, 132 U. S., 632.

"The government of the Territories of the United States belongs, primarily, to Congress, and secondly,

to such agencies as Congress may establish for that purpose. During the term of their pupilage as Territories, they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the general government.

"It is indeed, the practice of the government, to invest these dependencies with a limited power of self-government as soon as they have sufficient population for the purpose. The extent of the power thus granted depends entirely upon the Organic Act of Congress in each case, and is at all times subject to such alterations as Congress may see fit to adopt."

Snow vs. United States, 85 U. S., 317.

Section 1850 Revised Statutes U. S., requires all laws enacted by the Legislative Assembly of Washington Territory to be submitted to Congress, and if disapproved, they are void.

In construing this requirement, this Court has several times held that the assent of Congress may be implied, from lapse of time, and without specific sanction, to certain laws of a Territory. But the laws so presumptively sanctioned relate to Territorial matters of a general character, within the apparent scope of a Territorial legislature, and necessary to the efficient regulation and control of those general matters which had been delegated to the Territorial Legislature by Congress.

Clinton vs. Englebrecht, 80 U. S., 446.

"Congress in creating the territorial governments, and in conferring upon them powers of *general legislation*, did not, from obvious principles of policy and necessity, ordain a suspension of all acts

proceeding from those powers, until expressly sanctioned by themselves, whilst for considerations equally strong they reserved the power of disapproving or annulling such acts of territorial legislation as might be deemed detrimental. A different system of procedure would have been fatal to all practical improvement in those territories, however urgently called for; nay, might have disarmed them of the very power of self-preservation."

Miners' Bank vs. State of Iowa, 12 Howard, 7.

The case of *Baca vs. Perez*, 42 Pac. Rep., 162, cited in the opinion of the Court herein (record, p. 29), relates to matters of *general Territorial procedure*, and not to matters contained within a private act.

The opinion of the Circuit Court in this case (record, p. 28), distinguishes cases where it is necessary to construe a statute, from cases where it is plainly apparent that a Congressional statute prohibits the enactment of certain Territorial laws, and then holds that in the former case such implied consent of Congress thereto may be implied from lapse of time, and that in the latter case such consent is not presumed from lapse of time, regardless of the subject of the law.

It will not be held that an Act of Congress which in fact positively prohibits Territories from enacting certain legislation, is to be held inoperative because its full effect has not been given it in its construction, or that it is less binding because it is required to be construed before its true meaning is arrived at.

In further discussing the implied presumption of

the approval by Congress, from lapse of time, of this Territorial exemption act, the Circuit Court in this case (record, p. 27), says that—"Undoubtedly Congress could have enacted the statute in question," and there follows the inference, that being within the power of Congress to enact, in the absence of express disapproval, Congress must be presumed to have been content with it.

For Congress to have singled out a certain institution of learning in Washington Territory, to have made a law perpetually exempting its property from taxation, which should be binding upon the state thereafter to be formed, and hamper it in the enactment of laws for equal and uniform taxation, would be repugnant to the spirit of the Federal Constitution, and repugnant to the spirit and the letter of Congressional laws for the government of the Territories.

As stated in the opinion of the Court in this case (record, p. 25), the original Territorial act incorporating Whitman Seminary was enacted prior to the enactment of the Congressional prohibition against especial privileges and private charters, and the Territorial amendment exempting the property of Whitman College from taxation was enacted subsequent thereto.

We have hereinbefore suggested that the later Territorial act was practically a private re-incorporation, and within the inhibitions of the Federal statute; but if treated as an amendment to the original act, it would not permit the original charter to be

amended by inserting a clause in violation of the Act of Congress in force at the time the amendment was made.

Third. The Territorial Legislature had recognized the Congressional requirement that taxes must be uniform and equal, and that exemptions from taxation except in the cases specified were prohibited. Section 2829, of the Code of Washington Territory of 1881, provides:

“All property, real and personal within the Territory, except the property of the United States, of the Territory of Washington, of Municipal Corporations, of school districts, of burial grounds not owned or controlled for speculative purposes, household furniture to the amount of two hundred dollars in value for each family, wearing apparel in actual use, and food provided by the family, not to exceed one year's supply, shall be subject to taxation.”

The Territorial Act Did Not Constitute a Contract of Perpetual Exemption From Taxation—It Was a Gift Without Consideration.

The original territorial act of incorporation of Whitman Seminary contained no exemption from taxation, and was strictly required to use its property, income and proceeds for the benefit of the seminary as specified in the act. It was granted only the same rights, powers and privileges as were accorded other like institutions of learning in the territory. Twenty-three years thereafter, an amendment is made *at the instance of the original incorporators* (record, p. 3), exempting its property from taxation. It will be seen that the provisions of the amendatory

act are all practically within the provisions of the original charter, *with the exemption from taxation gratuitously thrown in*. The amendment even releases from the original charter the strict provision that the property and its income shall be used for the seminary, and vaguely permits it to be used for "education." No broader scope can be seen in the amended act, unless, it is, as is alleged in the complaint, that charitably inclined persons might donate property to a college whose property was not taxed, where they would not do so if the property would be subject to general taxation. The provision in the original charter limiting its capital stock to \$150,000 was eliminated by the amendment, but such provision, was superfluous, for the reason that it was never intended to have any capital stock.

In procuring and accepting the amended charter, the Board of Trustees of Whitman College gave no additional pledge, and promised nothing which it had not already promised and was bound in honor to perform under its acceptance of the original charter. There was no consideration to support a contract for exemption from taxation.

Grand Lodge of Louisiana vs. New Orleans,
166 U. S., 143.

V.

If Appellee Is Entitled to Relief in Any Event, the Decree of the Court Is Too Broad.

The decree in this case (record, p. 32), restrains and enjoins the appellants, in their respective capaci-

ties as the taxing and revenue officers of Walla Walla county, and each and every of their successors, "from listing for taxation or including upon the tax rolls of the said county of Walla Walla, any of the property, real or personal, belonging to the complainant herein; and that they and each of them be restrained and enjoined from attempting to collect or enforce, or in any manner taking proceedings looking to the collection or enforcement of taxes upon any of the property, real or personal, belonging to the said Board of Trustees of Whitman College; and that all property, real and personal, of the said Board of Trustees of Whitman College is not taxable."

Paragraph II of the complaint (record, p. 3), alleges that Whitman Seminary after its formation in 1859, acquired by contribution and otherwise, a large amount of real and personal property in Washington Territory. *All this property remained subject to taxation.*

Paragraph IV of the complaint (record, p. 5), alleges that after the amendment exempting the property of Whitman College was enacted, the trustees of Whitman Seminary conveyed to Whitman College the property which it had acquired, in reliance on the act of exemption.

The decree, so far as it exempts this property from taxation, is erroneous for the following reasons:

The appellee must necessarily take the position

throughout this case and upon this appeal, that the trustees of Whitman Seminary and of Whitman College constitute a single corporation,—that it is simply the original corporation with its name changed, and its powers and privileges enlarged.

In alleging that the trustees of Whitman Seminary conveyed its property to the trustees of Whitman College, in consideration of the grant of exemption from taxation of property of the latter corporation, the two corporations are placed in the position of dealing with each other as *separate corporate entities*, and if given full effect by the Court, would nullify the corporate existence of appellee, because the grant to it of its private charter by the Legislature of the Territory of Washington was expressly prohibited by the Federal statute.

The appellee should not be allowed to assume the two positions. If this Court shall adopt the first view, which is the most charitable one on behalf of appellee, then the transfer to the trustees of Whitman College of the property theretofore acquired by Whitman Seminary must be deemed to have been for the sake of lucidity of title, owing to the change of names, and will not be deemed to have been acquired in reliance upon any grant of exemption from taxation of the property of Whitman College, as is pleaded and relied on by appellee.

There was no consideration whatever to support the exemption from taxation of this property, already acquired, and we submit that, in any event, it

should be eliminated from the operation of the decree.

VI.

The sixth assignment of error raises the question of the sufficiency of the bill of complaint for lack of equity, and for lack of the jurisdictional amount in controversy.

Federal Courts will not assume jurisdiction to enjoin a state tax, excepting it clearly appears, not only that the tax is illegal, but that the owner of the property taxed has no adequate remedy by the ordinary processes of the law, and that there are especial circumstances bringing the case under some recognized head of equity jurisdiction.

Dow vs. Chicago, 11 Wall., 108.

Hannewinkle vs. Georgetown, 15 Wall., 547.

State Railroad Tax Cases, 92 U. S., 575.

Milwaukee vs. Koeffler, 116 U. S., 219.

Shelton vs. Platt, 139 U. S., 591.

P. C. & St. L. R. Co. vs. Board Public Works,
172 U. S., 32.

Indiana Mfg. Co. vs. Cohne, 188 U. S., 681.

The equities alleged in the bill, under which the jurisdiction of the Federal Court is invoked, are that the tax casts a cloud upon the title of real estate, a multiplicity of suits, and no adequate remedy at law.

As to cloud upon title, this Court in *Indiana Mfg. Co. vs. Cohne*, cited above, decides that an ordinary assessment, under state laws, of real estate, cannot be

considered as a cloud upon title sufficient to invoke the jurisdiction in equity of a Federal Court.

A single action in the state court of Washington would as effectually settle the rights of appellee as would this action in the Federal Court.

Benn vs. Chehalis County, 11 Wash., 134.

Washington Iron Works vs. King County, 20 Wash., 150.

“The courts of this state have power by injunction to restrain the enforcement of an illegal tax upon real property, and to remove the apparent lien created by the invalid levy.”

Northwestern Lumber Co. vs. Chehalis County, 24 Wash., 626.

Phillips, as Executor, vs. Thurston County, 35 Wash., 187.

We submit that the allegations of the bill of complaint are not sufficient to entitle appellee to be heard in the Federal Court, regardless of the merits, and that it should be compelled to seek its remedy in the courts of the State of Washington.

Respectfully submitted,

LESTER S. WILSON,

EVERETT J. SMITH,

Attorneys for Appellants.

In the Supreme Court of the United States

E. J. BERRYMAN, Assessor; **P. B. HAWLEY**,
Treasurer; **W. J. HONEYCUTT**, Auditor, and
J. H. MORROW, **GEORGE STRUTHERS** and
J. N. McCAW, Commissioners, constituting
the Board of Equalization of Waila Walla
County, Washington,

Appellants,

vs.

**BOARD OF TRUSTEES OF WHITMAN COL-
LEGE,**

Respondent.

Office Supreme Court
FILED

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JAMES H. McK

No. 8

Appeal from the Circuit Court of the United States for
the Eastern District of Washington.

BRIEF OF RESPONDENT

GEORGE TURNER,
Spokane, Washington,
THOMAS BURKE,
Seattle, Washington,
W. T. DOVELL,
Seattle, Washington,
For Respondent.

IN THE
Supreme Court of the United States

No. 533

E. J. BERRYMAN, Assessor; P. B.
HAWLEY, Treasurer; W. J.
HONEYCUTT, Auditor, and
J. H. MORROW, GEORGE
STRUTHERS and J. N. Mc-
CAW, Commissioners, constitut-
ing the Board of Equalization of
Walla Walla County, Washing-
ton,

Appellants,

vs.

BOARD OF TRUSTEES OF
WHITMAN COLLEGE,

Respondent.

Appeal from the Circuit Court of the United States
for the Eastern District of Washington.

BRIEF OF RESPONDENT

Upon Question of Jurisdiction.

It is first asserted that the Circuit Court lacked
jurisdiction because the amount involved is less than

Two Thousand Dollars. The amount of the tax for the year 1906, the collection of which we have sought, as a part of the relief demanded, to have enjoined, is Nine Hundred Forty-six and 32/100 (\$946.32) Dollars, and because the amount of the tax for that year is less than the jurisdictional amount, appellants conclude that the Circuit Court is deprived of jurisdiction. The statute is:

“The Circuit Court of the United States shall have original cognizance * * * where *the matter in dispute* exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.”

The inquiry, therefore, is whether or not it is disclosed in apparent good faith by the bill that the matter in dispute exceeds in value the sum of Two Thousand Dollars. To determine this question we have only to ascertain what is the “matter in dispute.” It is clearly disclosed that we claim a perpetual right to have all our property exempted from taxation. This right thus asserted in our bill is disputed by the appellants. It is set forth in the bill as amended by the stipulation (Record pp. 10 and 18) the “complainant asserts, and by this action seeks to enforce a right perpetual to the exemption of taxation of all the property, real and personal, of said complainant.” What then is the value of this right to a perpetual exemption so asserted by us and so disputed by the appellants? It is alleged to exceed the value of \$2,000, and if the amount of the tax for one year upon our property in one county alone be Nine Hundred Forty-six and 32/100 Dollars, clearly the

right to a perpetual exemption of all our property exceeds in value the jurisdictional amount. If this naked statement be not sufficient to establish our contention, the decisions preclude any controversy.

In *Betterman v. Louisville & Nashville R. R. Co.*, 207 U. S. at p. 225, it was said:

"Besides the substantial character of the jurisdictional averment in the bill is to be tested, not by the mere immediate pecuniary damage resulting from the acts complained of, but by the value of the business to be protected and the rights of property which the complainant sought to have recognized and enforced."

In *Mississippi & Missouri R. Co. v. Ward*, 2 Black 485, it was declared that the question of jurisdiction is to be tested by the object to be gained by the bill, and this rule has since been consistently adhered to.

The case of *Hunt v. N. Y. Cotton Exchange*, 205 U. S. 322, is entirely analogous upon principle.

In the case of *Lanning v. Osborne*, 79 Fed. 657, the receiver of a water company brought suit against a large number of defendants, asserting his right to collect a rental of \$7.00 per acre, and asserting that the defendants were about to commence suits to compel him to furnish water at a rental of \$3.50 per acre. Objection was made to the jurisdiction because of the amount involved.

Judge Ross, in the course of his opinion, said:

"The real subject of the controversy is the asserted right on the part of the land and town com-

pany to establish the rates at which it will furnish water to the defendants for the purpose of irrigation, in the absence of any action on the part of the board of supervisors of the county. The establishment of that right, denied by the defendants, is the principal object of the bill, and it is the value of that right which constitutes the amount in controversy."

Without further elaboration the following cases will demonstrate an adherence to the rule for which we contend, viz., that when the object or purpose of the bill is the assertion of a right which is alleged to be disputed by the respondent and it may be fairly gathered from the bill that the asserted right is of a value in excess of Two Thousand Dollars, jurisdiction is thereby conferred:

- Brown v. Trousdale*, 138 U. S. 389;
- Nashville C. & St. L. Ry. Co. v. McConnell*, 82 Fed. 65;
- Scott v. Donald*, 165 U. S. 107;
- Texas & Pac. Ry. Co. v. Kuteman*, 54 Fed. 547;
- Stinson v. Dousman*, 20 How. 461;
- Evenson v. Spaulding*, 150 Fed. 517;
- Delaware Ry Co. v. Frank*, 110 Fed. 689;
- Smith v. Adams*, 130 U. S. 167;
- Albright v. Sandoval*, 200 U. S. 9;
- American Fertilizing Co. v. Board of Agriculture*, 43 Fed. 609;
- Simon et al. v. House et al.*, 46 Fed. 317;
- Humes v. City of Ft. Smith, Ark.*, 93 Fed. 857;
- Southern Express Co. v. Mayor, etc., of Ensley*, 116 Fed. 756;
- City of Hutchinson v. Beckham*, 118 Fed. 399;
- Pennsylvania Co. v. Bay*, 138 Fed. 203.

But a casual examination of the cases cited in appellants' brief is necessary to convince that but one of them is in point, and that the case of *Citizens' Bank v. Cannon*, 164 U. S. 319. The rule announced in that case is to be distinguished from the rule for which we contend by the specific statement in the opinion that it "is not a suit to exempt property from taxation permanently."

We waive the probative effect which a decree in this case will have if the right be asserted in other counties to tax other property than that described in the bill which we now have or may hereafter acquire and devote to the purposes of education. But the Court will not fail to regard the allegation in Paragraph VII of our bill (Record, p. 6) that unless our charter exemption be respected it will be impossible to secure further voluntary contributions for the support and conduct of the institution. We have made this allegation candidly in the belief that it is susceptible of proof, and it would be at least premature for the Court to say now that it is not. If it is, it is clear that the amount of our damage will exceed the sum of the amounts we are required to pay as taxes from year to year if our perpetual exemption be denied,—an amount necessarily indefinite, but comprehended within our general allegation that our damage is in excess of the jurisdictional sum.

Assuming the jurisdictional amount to be sufficient, the Circuit Court had power to hear the cause under the authority of numerous cases:

Given v. Wright, 117 U. S. 648;

Walla Walla City v. Walla Walla Water Co.,
172 U. S. 1;

City Ry. Co. v. Citizens' R. Co., 166 U. S. 557;
Vicksburg Water Works Co. v. Vicksburg,
185 U. S. 65;

Wilmington & Weldon R. Co. v. Alsbrook, 146
U. S. 279;

Ill. Cent. R. Co. v. Adams, 180 U. S. 28;
Starin v. N. Y., 115 U. S. 248.

The rule that an asserted exemption from taxation will not be upheld, if by any reasonable interpretation it may be avoided, has no application here.

We freely concede the rule to be as stated by appellants that "the taxing power of the State is never presumed to be relinquished and it exists unless the intention to relinquish it is declared in clear and unambiguous terms, admitting of no other reasonable construction."

But we deny the application of the rule to the present case. Concede the power of the Legislature to grant the exemption and it will not be denied that it has conferred this grant in clear and unambiguous terms. The granting clause is not open to construction.

Citizens' Bank v. Parker, 192 U. S., at p. 85.

We invoke, therefore, the application of another rule by which the validity of the legislative act is to be tested.

As was said in *Clinton v. Englebrecht*, 13 Wall. 441:

“The theory upon which the various governments for portions of the territory of the United States have been organized, has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of National authority, and with certain fundamental principles established by Congress.”

Or as it is stated in *Swan v. Williams*, 2 Mich. 431:

“It must not be understood that no restraints were, in our view, imposed upon the Legislatures; but that such were rather in the nature of *constitutional restraints*, than of a reservation of power in the general government, perfectly consistent with every exercise of sovereignty compatible with republican institutions, and such as the people, in the erection of every State of this Union, have imposed upon legislative authority.” (Italics ours.)

In *Walker v. S. P. Ry. Co.*, 165 U. S. 593, at p. 604, it was said of a Territory that “in it the Legislature has all legislative power except as *limited* by the Constitution of the United States and the organic act and the laws of Congress appertaining thereto.” (Italics ours.)

May we not then invoke the rule that the Court will not strike down an act of the Territorial Legislature unless it be *clearly* repugnant to the paramount law, and if, by any reasonable interpretation of the act, it may be made to consist with the superior law, it shall stand.

The Congress granted to the people of the Territory of Washington the right of self-government. In

so doing it placed upon them the duty of providing for the education of their youth, and failed to make a specific charge as to how that duty should be performed. The creation of our institution by a charter containing the grant upon which we rely was one method those people adopted to perform that appointed task. Is it not fair to assume that that plan will not be demolished unless it be found unquestionably to defy some provision of the paramount law? Such hostility may by a fair interpretation be avoided, as we shall shortly show.

The term "especial privileges" as used in the Act of Congress does not refer to a grant of this character.

The act of 1867 provides:

"that the legislative assemblies * * * shall not * * * , grant *private charters* or *especial privileges*, but they may, by general incorporation acts, permit persons to associate themselves together, etc. * * * " (Italics ours.)

While superficially it might appear that the grant of immunity from taxation is an "especial privilege," it has not been generally so held.

In *Chesapeake & Ohio Railway Co. v. Miller*, 114 U. S. 176, it was held that a grant of an exemption or immunity from taxation did not pass under a sale of "franchise rights and privileges."

The Court said:

"The words used are, it will be observed, 'franchises, rights and privileges * * * as would

have been had, * * * by the first company, but for such sale,' etc. There is no express reference to a grant of any exemption or immunity; nothing is said in relation to the subject of taxation. *The words actually used do not necessarily embrace a grant of such exemption.*" (Italics ours.)

In *Phoenix Insurance Co. v. Tennessee*, 161 U. S. 174, it is likewise held that a state statute granting to a company incorporated by it "all the 'rights and privileges' which had been granted by a previous statute of the state to another corporation, does not confer upon the new company an exemption from taxation * * * which was conferred upon the other company by the act incorporating it." (Italics ours.)

The provisions of this act of 1867 were construed by the Supreme Court of Dakota in the case of *City of Elk Point v. Vaughn*, 46 N. W. 577, at p. 578, and it was there held that "the term 'especial privileges' refers to the granting of monopolies, such as ferries, trade-marks, the exclusive right to manufacture certain articles, or to carry on certain business in a particular locality to the exclusion of others." The same definition was approved in the *City of Plattsmouth v. Nebraska Telephone Company (Neb.)*, 114 N. W. 588.

Prior to the passage of the act of 1867, the Legislature of the Territory of Washington (and we are justified in assuming that such was the rule in the other territories) was in the habit of granting private charters containing powers and privileges special to each corporation created.

The right to occupy and often monopolize ferry

sites, bridge sites or highways was thus granted, and there was no uniformity in the powers, franchises and privileges thus granted to different incorporations.

To demonstrate this condition by setting forth these various acts would improperly encumber this brief. Many of them may, however, be found by the following references to the Session Laws of the Territory:

Sess. Laws 1857-58, pp. 45, 46, 48; Sess. Laws 1859-60, pp. 415, 417, 418, 428, 430, 439, 440, 442, 443, 445, 447, 449, 450, 453, 459, 460, 463, 464, 465, 467, 472, 473; Sess. Laws 1860-61, pp. 72, 74, 75, 79, 82, 84, 86, 88, 97, 105, 107, 110, 112, 115, 116, 123, 128; Sess. Laws 1861-62, pp. 63, 65, 69, 75, 80, 81, 83, 89, 90, 91, 92, 99, 102, 105, 108, 114, 115, 117, 119, 124, 128, 130, 131, 132, 133, 135; Sess. Laws 1862-63, pp. 57, 61, 63, 65, 66, 67, 70, 73, 75, 76, 77, 78, 84, 86, 88, 89, 90, 91, 93, 95, 96, 100, 101, 102, 103, 104, 105, 107, 108, 109, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132; Sess. Laws 1864-65, pp. 90, 91, 93, 94, 95, 97, 98, 99, 100, 102, 103, 105, 107, 108, 114, 120, 124, 144, 148; Sess. Laws 1865-66, pp. 169, 172, 178, 180, 186, 188, 189, 193, 196, 200, 204, 207, 210; Sess. Laws 1866-67, pp. 207, 211, 213, 216, 218.

It was to prevent this and to establish uniformity in the powers and privileges of corporations that the act of 1867 was passed. It was meant to deprive the Legislature of the power to grant private charters and to require them to pass general laws for this purpose.

The case of *Jones v. Habersham*, 107 U. S. 174, is believed to be directly in point and to sustain the interpretation for which we contend. In that case

the charter of an incorporated society contained a proviso limiting its income and limiting the purposes for which its funds should be appropriated.

The charter was amended by a legislative act so as to eliminate these provisos, and it was contended that the amendatory act was unconstitutional and void as being in contravention of the provision in the constitution of the state to the effect that the general assembly should not grant corporate powers and *privileges* to private companies. The Court said:

“But the words ‘corporate powers and privileges,’ as here used, signify the *corporate franchise*, the aggregate powers and privileges which constitute a corporation, not every separate power and privilege which may be conferred upon a corporate body. The object is to take away from the legislature, and to vest in the courts, under its direction, for the future, the creation of private corporations for literary, religious, charitable, or other purposes, except those specially excepted; but not to prevent the legislature from amending the charters of corporations already existing, and modifying or enlarging their powers, either by repealing former restrictions or otherwise.” (*Italics ours.*)

No grant made by the State for an adequate consideration may be called an “especial privilege.”

That an institution of the character of Whitman College renders to the State a consideration to support its charter can no longer be questioned.

Dartmouth College v. Woodward, 4 Wheaton 519;

Home of Friendless v. Rouse, 8 Wall. 430, 437;

State v. Hamline University (Minn.), 48 N. W. 1119;

Yale University v. Town of New Haven (Conn.), 42 Atl. 87.

In the case of *State of Illinois v. Ill. Cent. R. Co.*, 33 Fed. 730, at p. 769, it was contended that a grant to a railway company of lands to be used as depot ground and for the purpose of improving a harbor was in contravention of the constitutional provision which forbids a grant of special or exclusive privileges.

The late Justice Harlan, then upon Circuit, said:

"The constitutional provisions just cited have no bearing upon the present case. The act of 1869 is not a 'grant of special or exclusive privileges' within the meaning of those provisions. It is a grant of lands to a railroad corporation to be used, part of them as passenger depot grounds, and part of them for the purpose of improving a harbor and thereby promoting commerce and navigation upon public navigable waters."

In *Trustees of Exempt Firemen's Fund v. Roome*, 93 N. Y. 313, an act of the Legislature of New York required the agents of foreign fire insurance companies to pay to it a certain percentage upon the gross premiums for the maintenance of the Trustees of the Exempt Firemen's Fund, a corporation. It was contended that this was violative of a provision in the state constitution prohibiting the granting to any private corporation of any exclusive privilege, immunity or franchise; but it was held that inas-

much as the beneficiary corporation was engaged in the performance of a function which was a public duty, the constitutional inhibition did not apply.

It is said in the course of the opinion:

“When the State takes from the public treasury a sum of money and gives it to a corporate body for the relief of deserving beneficiaries it does one of two things. It either bestows a charity, or recognizes and discharges an obligation due from it to the recipients. The former it cannot do except in specified cases. The latter it may always do, for the constitutional provision was not intended and should not be construed to make impossible the performance of an honorable obligation founded upon a public service, invited by the State, adopted as its agency for doing its work, and induced by exemptions and rewards which good faith and justice require should last so long as the occasion demands.”

The maintenance of institutions of learning has ever been considered a public function, and any corporation or association which helps to perform this function renders a public service.

The Congress of the United States recognized this function and the necessity of its performance with regard to the State of Washington when, by the act of 1850 and the act of 1854 (9 Stat. at L. 499 and 10 Stat. at L. 305) it appropriated two townships of the public lands within the Territory for the support of a university within that Territory.

Manifestly, the function of providing means of higher education for the youth of the Territory could not be completely performed by this provision. The

incorporators of Whitman College undertook to assist in the performance of this function, and to that end there was granted to those incorporators a charter for the establishment of an undenominational, non-sectarian institution of the higher learning. In consideration of the work that institution was to perform there was granted to it an immunity from taxation. Such a grant is not a mere gratuity or bounty, nor is it a special privilege, any more than the reward which an employe or one who renders service to the State under contract, or otherwise, receives, is a special privilege.

Nor is it to be presumed that Congress intended by the act of 1867 to prohibit the grant of immunity from taxation in such cases, and for such consideration. It is a fact which must be judicially recognized that since colonial days the public and beneficial character of institutions of this kind had been recognized in the various states, and their property had been often exempted from taxation. The members of Congress must have realized that those men who cut themselves loose from the civilization of the East to plant a new civilization in the unexplored regions of the West would have the same aspirations that their forebears had indulged, and would, therefore, be ambitious to establish in this new country institutions of the same character as had existed in the country whence they came. It is not to be believed that the members of Congress intended to deny to those intrepid pioneers the right which had theretofore been so commonly exercised, viz., the right to foster in-

stitutions of learning by exempting them from taxation.

Upon this branch of the case it would appear that nothing could be said which would add to the convincing force of the opinion rendered in the Court below by the late Judge Whitson. No man knew better than he the institutions of our early Territorial government; and no one appreciated better than he the immensity of the task which confronted the pioneer who, even while struggling to conquer the wilderness, sought the higher learning and the better culture. It was impossible for him to conceive that in this land there should be a grudging of those favors which had been so freely given in other portions of America.

We submit, therefore, that for the foregoing reasons the act of the Legislature granting the exemption in our charter is not in hostility to the act of Congress which is claimed to be inhibitory.

The Act of the Territorial Legislature granting the exemption, not having been disapproved, is valid.

There was conferred upon Territorial Legislatures the power to legislate upon "all rightful subjects of legislation not inconsistent with the Constitution and Laws of the United States."

§1851 Rev. Stat.

"In the absence of constitutional restrictions, or, if such restrictions exist, within the limits laid down by the fundamental law, the legislature has plenary power to create whatever exemptions it may deem ex-

pedient. This doctrine is too well established by authority to admit of discussion or to be called in question."

12 A. & E. Enc. of Law (2nd Ed), p. 272;

First Div. of the *St. Paul & Pacific R. Co. v.*

Frank M. Parcher, etc., 14 Minn. 224, at 250.

§1850 of the Revised Statutes is as follows:

"All laws passed by the legislative assembly and governor of any Territory, except in any Territories of Colorado, Dakota, Idaho, Montana, and Wyoming, shall be submitted to Congress, and, if disapproved, shall be null and of no effect."

This provision applied to the State of Washington.

In *Clinton v. Englebrecht*, 13 Wall. 446, it is said:

"In the first place we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the statute-book for more than twelve years. It must have been transmitted to Congress soon after it was enacted, for it was the duty of the Secretary of the Territory to transmit to that body copies of all laws, on or before the 1st of the next December in each year. The simple disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body."

Judge Cooley, in his work upon constitutional limitations (*Cooley's Constitutional Limitations*, 7th Ed., p. 54—Note) says:

"The legislation, of course, must not be in conflict with the law of Congress conferring the power to legislate, but a variance from it may be supposed

approved by that body if suffered to remain without disapproval for a series of years after being duly reported to it."

Miners' Bank v. State of Ia., 12 How. 1;

Atlantic & Pac. R. Co. v. Lesueur, (*Ariz.*), 19 Pac. 157;

Sperling v. Calfee (*Mont.*), 19 Pac. 204.

Baca v. Perez, 42 Pac. 162;

Williams v. Bank of Mich., 7 Wend. 540.

We shall not contend, however, that if the act of the Legislature is violative of the inhibition contained in the Congressional act, it became valid because of the failure of Congress to disapprove, for it was said in the case of *Clayton v. Utah*, 132 U. S. 632, at p. 642:

"It is true that in a case of doubtful construction the long acquiescence of Congress and the general government may be resorted to as some evidence of the proper construction, or of the validity, of a law. This principle is more applicable to questions relating to the construction of a statute than to matters which go to the power of the legislature to enact it. At all events, it can hardly be admitted as a general proposition that under the power of Congress reserved in the organic acts of the Territories to annul the acts of their legislatures the absence of any action by Congress is to be construed to be a recognition of the power of the legislature to pass laws in conflict with the act of Congress under which they were created."

Conceding the rule to be, however, as announced in the case last referred to, we shall contend that the failure of Congress to disapprove the act of the Leg-

islature is the strongest possible evidence of approval by that body. It is to be presumed that the act of the Legislature was, as required by law, reported to the Congress of the United States. For eight years (that being the interval between the passage of the act and our admission to statehood) Congress evidenced no disapproval. Regard is always to be given to the construction which a legislative body places upon its own laws, and it is but fair to assume that Congress, not having disapproved the act of the Legislature, so construed the act of Congress of 1867 as to conclude they were harmonious.

The Act of the Legislative Assembly of 1883 was an amendment of the pre-existing Charter and did not constitute a new Charter.

The amendatory act enlarged the scope of the institution which existed in the original charter, and under the authority of the following cases must be held to be merely amendatory and not the grant of a new charter:

Wallace v. Loomis, 97 U. S. 146;

Louisville Gas Company v. Citizens' Gas Co.,
115 U. S. 683;

Attorney General v. Joy (Mich.), 20 N. W.
806;

S. P. R. Co. v. Orton, 6 Sawyer 157, at p. 185;

Wells v. O. R. & N. Co., 15 Fed. 561.

The prohibition contained in the act of Congress did not deprive the Legislature of the power to alter the pre-existing charter by special law.

The rule is stated by Morawetz on Private Corporations, Vol. 1 (2nd Ed.), §12:

“The purpose of a constitutional prohibition against ‘grants of corporate powers’ by special acts is evidently similar to that of a provision against the creation of corporations by special acts. It means that the legislature shall not grant the power to *form a corporation by special act*, and this includes a prohibition against practically forming a new corporation by altering a corporation previously in existence. But it does not mean that the legislature shall not pass special laws regulating the affairs of corporations, or grant rights and privileges which may be exercised without a departure from their existing charters.”

The same rule is announced in an elaborate opinion by Judge Ryan in the case of *Attorney General v. Railroad Companies*, 35 Wis. 425.

The grant of perpetual exemption is based upon a consideration so that it constitutes a contract.

It is suggested by appellants in their brief that no new obligation was cast upon the institution and no new function undertaken to be performed by the amended charter, and that, therefore, the case falls within the rule laid down.

Grand Lodge of La. v. New Orleans, 166 U. S. 143.

In that case a corporation had accepted a grant of property conditioned that it should be used for charitable purposes. It claimed the benefit of an act passed subsequent to the acceptance of such grant

exempting it from taxation, and it was held that inasmuch as it undertook to perform no obligation by reason of such act, over that which it had undertaken before and was in duty bound to perform at the time of the passage of the act, there was no consideration for the exemption. The distinction between that and the present case appears clear. By the provisions of the act of 1859 we were incorporated as a seminary "for the instruction of persons of both sexes in *science and literature*." It is alleged in the bill that for the purpose of better providing means for the education of the youth of both sexes in *literature, science and art*, and for the purpose of securing further voluntary contributions, we obtained the amended charter. It will be observed that by the amendatory act the scope of the institution was increased from that of a seminary to a college. As commonly understood in this country there is a clear distinction between the scope of a seminary and a college.

President Arthur T. Hadley, of Yale, has expressed it in this way:

"A seminary allows less independence of thought and generally teaches much less advanced studies than a college."

Moreover, it will be observed that the charter of 1859 contemplated the formation of a corporation having a capital stock of \$150,000, the income and proceeds of which should be devoted to the benefit of the institution. Having devoted the income and proceeds of the original capital stock for the purpose

of education, there was no obligation upon the corporation to use any other property which it might acquire by gift, or otherwise, for the purpose of education.

By the amended act, however, the corporation undertook the obligation of devoting all its property, including the income and proceeds thereof, for the purpose of education. This enlarged scope, on account of which large contributions are alleged to have been received and the additional obligation undertaken by the amended charter, furnished the consideration for the exemption.

City Railway Co. v. Citizens R. Co., 166 U. S. 557.

The consideration for a grant of an exemption from taxation to an institution of this character is always to be presumed. In *Illinois Central R. R. v. Decatur*, 147 U. S., at p. 201, it was said:

“A grant of exemption is never to be considered as a mere gratuity—a simple gift from the legislature. No such intent to throw away the revenues of the State, or to create arbitrary discriminations between the holders of property, can be imputed. A consideration is presumed to exist. The recipient of the exemption may be supposed to be doing part of the work which the State would otherwise be under obligations to do. A college, or an academy, furnishes education to the young, which it is part of the State’s duty to furnish. The State is bound to provide highways for its citizens, and a railroad company in part discharges that obligation. Or the recipient may be doing a work which adds to the material prosperity or elevates the moral character of

the people; manufactories have been exempted, but only in the belief that thereby large industries will be created and the material prosperity increased; churches and charitable institutions, because they tend to a better order of society."

The exemption in the Charter is not in contravention of the organic act.

It is suggested by appellants that the exemption clause in the charter contravenes the provision to be found in the organic act, which is as follows:

"All taxes shall be equal and uniform, and no distinctions shall be made in the assessments between different kinds of property, but the assessments shall be made according to the value of the property."

The Supreme Court of the State of Washington, in *Columbia & Puget Sound Railroad Company v. Chilberg*, 6 Wash. 612, construed this provision of the organic act and held that an act of the Territorial Legislature exempting railroad property from taxation and substituting taxation upon the gross earnings of the railroad was not in contravention of this provision, the Court saying in the course of its opinion:

"Under this provision in the organic act there can be no doubt of the right of the legislative assembly to exempt the property of any person or corporation. Such has been the holding of nearly, or quite all of the courts of the different states, under constitutional provisions requiring assessments to be according to value as broad and full as the clause of the organic act above set out."

The legislative act by virtue of which we claim the

exemption is a continuing act and now constitutes a law of this State. Its application is entirely local to the State, and affects only its internal affairs. By virtue of this law we are asserting a right as against the State, and if the highest judicial tribunal of that State uphold that law it is believed the interpretation of the State Court will be adopted here. Other authorities adopting the same construction for similar provisions are:

- High v. Shoemaker*, 22 Cal. 363;
City of Athens v. Long, 54 Ga. 330;
City of New Orleans v. Commercial Bank, 10 La. 735;
City of New Orleans v. Davidson, 30 La. 554;
City of New Orleans v. Fourchy, 30 La. 910.

The Complainant has no adequate remedy at law.

It is alleged in the bill (Record, p. 10) not only that the tax is illegal, but that the assessor threatens to extend such taxes upon his books so as to constitute a colorable lien against the property of complainant, thereby constituting a cloud upon the title thereof. And it is further alleged that he threatens to issue delinquent certificates for said taxes against said property, thus necessitating a multiplicity of suits for the enforcement thereof.

The following are §§9252, 9253, 9254 of Remington & Ballinger's Annotated Codes and Statutes of Washington:

"§9252 (1749.*) Certificates of Delinquency, Guaranty of.

Any day, after the expiration of twelve months after the taxes charged against real property are delinquent, the treasurer shall have the right, and it shall be his duty, upon demand and payment of the taxes and interest, to make out and issue a certificate or certificates of delinquency against such property, and such certificate or certificates shall be numbered and have a stub, which shall be a summary of the certificate and shall contain a statement: (1) Description of the property assessed. (2) Year or years for which assessed. (3) Amount of tax and interest due. (4) Name of owner, or reputed owner, if known. (5) The rate of interest the certificate shall bear. (6) The time when a deed may be had, if not sooner redeemed. (7) When a certificate of any preceding year is outstanding and unredeemed, it shall be stated in subsequent certificates issued, and the principal sum due, with date of issue. (8) A guaranty of the county or municipality to which the tax is due that if for any irregularity of the taxing officers this certificate be void, then such county or municipality will repay the holder the sum paid thereon with interest at the rate of six per cent. per annum from the date of its issuance: Provided, that nothing herein contained shall prevent the running of interest during the said period of twelve months from the date of delinquency, at the rate of interest provided by law on delinquent taxes. (L. '97, p. 181, § 94; L. '03, p. 384, § 1; L. '07, p. 453, § 1.)

§9253 (1750) Interest on—Effect of Certificate.

Certificates of delinquency shall bear interest, from the date of issuance till redeemed, at the rate of fifteen per cent. per annum, and shall be sold to any person applying therefor, upon the payment of the value in principal and interest thereof: Provided, that when, from the failure of the taxing officers to do or perform any act in listing or assessing property, or in issuing such certificate, the same is declared void and the same is redeemed by the county

or municipality issuing the same, such rate of interest shall be six per cent. per annum.

Certificates of delinquency shall be prima facie evidence that—

1. The property described was subject to taxation at the time the same was assessed;
2. The property was assessed as required by law;
3. The taxes or assessments were not paid at any time before the issuance of the certificate;
4. Such certificate shall have the same force and effect as a judgment execution and sale of and against the premises included therein. (L. '97, p. 181, §95.)

§9254 (1751*) Foreclosure of Certificate—Procedure.

Any time after the expiration of three years from the original date of delinquency of any tax included in a certificate of delinquency, the holder of any certificate of delinquency may give notice to the owner of the property described in such certificate that he will apply to the Superior Court of the county in which such property is situated for a judgment foreclosing the lien against the property mentioned herein. Such notice shall contain:

(1) The title of the court, the description of the property and the name of the owner thereof, if known, the name of the holder of the certificate, the date thereof, and the amount for which it was issued, the year or years for the delinquent taxes for which it was issued, the amount of all taxes paid for prior or subsequent years, and the rate of interest on said amount.

(2) A direction to the owner summoning him to appear within sixty days after service of the summons, exclusive of the day of service, and defend the action or pay the amount due, and when service is

made by publication a direction to the owner, summoning him to appear within sixty days after the date of the first publication of the summons, exclusive of the day of said first publication, and defend the action or pay the amount due.

(3) A notice that, in case of failure so to do, judgment will be rendered foreclosing the lien of such taxes and costs against the land and premises named.

(4) The summons shall be subscribed by the holder of the certificate of delinquency, or by some one in his behalf, and residing within the State of Washington, and upon whom all process may be served.

(5) A copy of said notice shall be delivered to the county treasurer. Thereafter when any owner of real property or person interested therein seeks to redeem as provided in section 9259, the treasurer shall ascertain the amount of costs accrued in foreclosing said certificate and include said costs as a part of the redemption required to be paid. (L. '97, p. 182, §96; L. '99, p. 296, §13; L. '01, p. 383, §1.)

It is clear that the issuance of a delinquent certificate under our statute for an illegal tax is the imposition of an unwarranted cloud upon title which it is the function of a court of equity to remove or to prevent by injunction.

In the following cases the Supreme Court of the State of Washington has held an illegal tax to be a cloud upon the title to real estate, and that the right exists in this State to a remedy in equity for its removal.

Andrews v. King County, 1 Wash. 46;
Benn v. Chehalis County, 11 Wash. 134;
Phelan v. Smith, 22 Wash. 397;

Kinsman et al. v. Spokane, 20 Wash. 118;
Lewiston Water Co. v. Asotin County, 24
Wash. 371;
N. W. Lumber Co. v. Chehalis County, 24
Wash. 626.

There exist, therefore, those especial circumstances which bring this case under a well recognized head of equity jurisdiction.

The Decree is not too broad.

It is suggested that the decree has been made too broad, inasmuch as it exempts all the property of the Board of Trustees of Whitman College, which includes property held by the Seminary under its original charter.

We believe it sufficiently appears from the bill that all the property which the Trustees of Whitman College held under the original charter is now held by the Trustees of Whitman College under the amended charter, and that all that property so held is devoted to the purposes of education, and, therefore, if the exemption provision in the amended charter be valid, it is not taxable.

The Court will notice the allegation in the bill is not that Whitman Seminary conveyed its property to Whitman College as a separate entity, but that the *Trustees* of the Seminary conveyed the property to the *Trustees* of the College.

The Exemption, if valid, extends to all the Property of the College.

While the contrary is not contended in the printed brief of the appellants, we nevertheless cite the following cases upon the proposition that the exemption clause in our charter is explicit enough to cover all the property of the institution, the same being used for the purposes of education.

University v. People, 99 U. S. 309;
Colorado Seminary v. Board of Commissioners (Colo.), 71 Pac. 410;
Book Agents v. Hinton (Tenn.), 21 S. W. 321;
North St. Louis Society v. Hudson, 85 Mo. 32;
Trustees of Wesleyan Academy v. Inhabitants of Wilbraham, 99 Mass. 599;
The State v. Ross, 24 N. J. Law 497;
Trustees of Griswold College v. State (Ia.),
 26 Am. Rep. 138.

We submit that the decree of the Court below should be affirmed.

Respectfully submitted,

GEORGE TURNER,
 Spokane, Washington,
 THOMAS BURKE,
 Seattle, Washington,
 W. T. DOVELL,
 Seattle, Washington,
For Respondent.

BERRYMAN *v.* BOARD OF TRUSTEES OF
WHITMAN COLLEGE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF WASHINGTON.

No. 95. Argued December 13, 1911.—Decided January 9, 1912.

The amount in controversy where the question is whether a contract of exemption from taxation has been impaired by subsequent legislation is measured by the value of the right to be protected and not by a mere isolated element, such as the tax for a single year.

In this case the jurisdictional value of amount in controversy *held* to exceed \$2,000, although the actual tax, the collection whereof was sought to be enjoined on the ground that its imposition impaired the obligation of a legislative contract, was less than \$2,000.

Cases, in which the jurisdictional value of amount in controversy is limited to the single tax involved, reviewed and distinguished.

The act of March 2, 1867, 14 Stat. 426, now Rev. Stat., § 1889, prohibiting the granting by territorial legislatures of especial privileges related to conferring new privileges on existing corporations as well as to granting privileges in original charters; and the prohibition included all especial privileges such as exemption from taxation.

In construing a statute the court must be controlled by the power

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manifested by the act and not by the motive which initiated it; the scope of the act may extend beyond the generating causes thereof.

The rule that exemptions from taxation must be strictly construed against the exemption is as broad as the subject to which it relates; the rule applies not only to the extent of the legislative grant itself but also to the power of the legislature to make it.

A contract for exemption from taxation is an especial privilege, and is none the less within the prohibitions of § 1889, Rev. Stat., because granted to an educational institution; it cannot be regarded as beyond the prohibition because granted as an equivalent.

The fact that Congress failed to disapprove an act of a Territorial legislature does not validate it if the act was passed in direct violation of a prohibitive provision in the organic act. *Clayton v. Utah*, 132 U. S. 632.

THE facts, which involve the jurisdiction of the Circuit Court of the United States on the question of the amount involved and also the validity of an act of the legislature of the Territory of Washington exempting property of an educational institution from taxation, are stated in the opinion.

Mr. Everett J. Smith, with whom *Mr. Lester S. Wilson* was on the brief, for appellants:

The amount in controversy is the tax in issue and no more, and as that is less than \$2,000, the Circuit Court had no jurisdiction.

The effect on future taxation of a decision that the particular taxation is invalid, cannot be availed of to add to the sum or value of the matter in dispute. *Holt v. Indiana Mfg. Co.*, 176 U. S. 68; *Clay Center v. Farmers' L. & T. Co.*, 145 U. S. 224; *New England Mortgage Co. v. Gay*, 145 U. S. 123; *Citizens' Bank v. Cannon*, 164 U. S. 319; *Rude v. Westcott*, 130 U. S. 152; *Walter v. North-eastern Railroad*, 147 U. S. 370.

The prayer for a perpetual injunction against future taxation is superfluous, and is evidently made in aid of

the jurisdictional amount. *Brown v. Trousdale*, 138 U. S. 389; *Smith v. Adams*, 130 U. S. 167.

The allegation that the amount in controversy is more than \$2,000 is a mere conclusion; and has no weight as against the specific allegations of the bill, failing to show such amount. *Fishback v. West. Un. Tel. Co.*, 161 U. S. 26.

The right claimed by appellee of perpetual exemption from taxation of property now owned by it, and of property which it may hereafter acquire, is purely conjectural. It may or may not own a dollar's worth of property at any given time. *Kurtz v. Moffitt*, 115 U. S. 487.

The sum or value of the amount in controversy may not be made up by a computation of the abstract rights of appellee to exemption from taxation upon whatever property, if any, it may at any time in the future own. *Washington & G. R. Co. v. Dist. of Col.*, 146 U. S. 227.

The Washington Territorial Exemption Act was not intended to bind the State thereafter to be formed.

The taxing power of the State is never presumed to be relinquished, and it exists unless the intention to relinquish it is declared in clear and unambiguous terms, admitting of no other reasonable construction. *Southwestern R. Co. v. Wright*, 116 U. S. 231.

Territorial governments cannot be presumed, where a State would be, to have intended to bind, by a territorial legislative act, States thereafter to be formed from them, in such sweeping and vital matters as to perpetually exempt from taxation all property which a private corporation may at any time acquire, within its borders.

Regardless of the intent of the territorial legislature, the exemption act was void, and did not constitute a contract for perpetual exemption from taxation.

The territorial legislature was directly prohibited from granting such exemption by the organic act, § 1924, Rev. Stat.

Singling out this especial college and enacting a law

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that its property should be exempt from taxation, showed a partiality and discrimination violative of the rule of both equality and uniformity required by § 1924, Rev. Stat. U. S. *Edye v. Robertson*, 112 U. S. 580; *Pollock v. Farmers' L. & T. Co.*, 157 U. S. 593; and 158 U. S. 601; *Cooley on Taxation* (1903 ed.), p. 381.

The requirement of uniformity in taxation refers to property or persons of the same class. It requires the rate to be uniform on the same class everywhere, with all people and at all times. *State v. Whittlesey*, 17 Washington, 447; *Miller*, Const. of United States, 241.

The territorial grant of exemption was an "especial privilege," within the meaning of the amendment to the organic act of March 2, 1867, § 1889, Rev. Stat. *New Jersey v. Wright*, 117 U. S. 648; *Morgan v. Louisiana*, 93 U. S. 217; *Wilson v. Gaines*, 103 U. S. 417; *Chesapeake & Ohio R. Co. v. Miller*, 114 U. S. 176; *Memphis & Little Rock R. Co. v. Berry*, 112 U. S. 609. The cases of *Phoenix Ins. Co. v. Tennessee*, 161 U. S. 174; *Pickard v. Tennessee & R. Co.*, 130 U. S. 642, simply decide that immunity from taxation is a personal, or an especial privilege, not extending beyond the immediate grantee, unless otherwise so declared in express terms.

A territorial law passed in violation of the positive prohibition of Congress is void. *Clayton v. Utah*, 132 U. S. 632; *Snow v. United States*, 18 Wall. 317.

While the assent of Congress may be implied, from lapse of time, and without specific sanction, to certain laws of a territory, laws enacted by the legislative assembly of Washington Territory require to be submitted to Congress, and if disapproved, they are void; § 1850, Rev. Stat.; *Clinton v. Englebrecht*, 12 Wall. 446. *Miners' Bank v. State of Iowa*, 12 How. 7; *Baca v. Perez*, 42 Pac. Rep. 162; this relates to matters of general territorial procedure, and not to matters contained within a private act as this one was.

The territorial legislature recognized the Congressional requirement that taxes must be uniform and equal, and that exemptions from taxation, except in cases specified, were prohibited; see § 2829, Code of Washington Territory, 1881.

The territorial act did not constitute a contract of perpetual exemption from taxation—it was a gift without consideration.

In procuring and accepting the amended charter, the Board of Trustees of Whitman College gave no additional pledge, and promised nothing which it had not already promised and was bound in honor to perform under its acceptance of the original charter. There was no consideration to support a contract for exemption from taxation. *Grand Lodge v. New Orleans*, 166 U. S. 143.

If appellee is entitled to relief in any event, the decree of the court is too broad.

Mr. W. T. Dovell, with whom *Mr. George Turner* and *Mr. Thomas Burke* were on the brief, for appellee:

The jurisdictional amount is involved. Although the tax for one year is less than \$2,000, clearly the right to a perpetual exemption of all of appellee's property exceeds that in value. *Betterman v. Louisville & Nashville R. R. Co.*, 207 U. S. 225; *Mississippi & Missouri R. Co. v. Ward*, 2 Black, 485; *Hunt v. N. Y. Cotton Exchange*, 205 U. S. 322; *Lanning v. Osborne*, 79 Fed. Rep. 657.

When the object or purpose of the bill is the assertion of a right which is alleged to be disputed by the respondent, and it may be fairly gathered from the bill that the asserted right is of a value in excess of two thousand dollars, jurisdiction is thereby conferred. *Brown v. Trousdale*, 138 U. S. 389; *Nashville, C. & St. L. Ry. Co. v. McConnell*, 82 Fed. Rep. 65; *Scott v. Donald*, 165 U. S. 107; *Texas & Pac. Ry. Co. v. Kuteman*, 54 Fed. Rep. 547; *Stinson v. Dousman*, 20 How. 461; *Evenson v. Spaulding*,

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150 Fed. Rep. 517; *Delaware Ry. Co. v. Frank*, 110 Fed. Rep. 689; *Smith v. Adams*, 130 U. S. 167; *Albright v. Sandoval*, 200 U. S. 9; *American Fertilizing Co. v. Board of Agriculture*, 43 Fed. Rep. 609; *Simon v. House*, 46 Fed. Rep. 317; *Humes v. City of Fort Smith*, 93 Fed. Rep. 857; *Southern Express Co. v. Mayor &c. of Ensley*, 116 Fed. Rep. 756; *City of Hutchinson v. Beckhan*, 118 Fed. Rep. 399; *Pennsylvania Co. v. Bay*, 138 Fed. Rep. 203.

Citizens' Bank v. Cannon, 164 U. S. 319, was not a suit to exempt property from taxation permanently.

Assuming the jurisdictional amount to be sufficient, the Circuit Court had power to hear the cause under the authority of numerous cases: *Given v. Wright*, 117 U. S. 648; *Walla Walla City v. Walla Walla Water Co.*, 172 U. S. 1; *City Ry. Co. v. Citizens' R. Co.*, 166 U. S. 557; *Vicksburg Water Works Co. v. Vicksburg*, 185 U. S. 65; *Wilmington & Weldon R. Co. v. Alsbrook*, 146 U. S. 279; *Ill. Cent. R. Co. v. Adams*, 180 U. S. 28; *Starin v. New York*, 115 U. S. 248.

The rule that an asserted exemption from taxation will not be upheld, if by any reasonable interpretation it may be avoided, has no application here. *Citizens' Bank v. Parker*, 192 U. S. 85; *Clinton v. Englebrecht*, 13 Wall. 441; *Swan v. Williams*, 2 Michigan, 431; *Walker v. S. P. Ry. Co.*, 165 U. S. 593.

The court will not strike down an act of the territorial legislature unless it be clearly repugnant to the paramount law, and if, by any reasonable interpretation of the act, it may be made to consist with the superior law, it shall stand.

Congress granted to the people of the Territory of Washington the right of self-government. In so doing it placed upon them the duty of providing for the education of their youth, and failed to make a specific charge as to how that duty should be performed. It is fair to assume

that the plan adopted will not be demolished unless it be found unquestionably to defy some provision of the paramount law.

The term "especial privileges" as used in the act of Congress does not refer to a grant of this character. *Chesapeake & Ohio Railway Co. v. Miller*, 114 U. S. 176; *Phoenix Ins. Co. v. Tennessee*, 161 U. S. 174; *Plattsmouth v. Nebraska Telephone Co.*, 114 N. W. Rep. 588.

The right to occupy—often to monopolize—ferry sites, bridge sites or highways had been granted, and there was no uniformity in the powers, franchises and privileges thus granted to different incorporations.

It was to prevent this and to establish uniformity in the powers and privileges of corporations that the act of 1867 was passed. It was meant to deprive the legislature of the power to grant private charters and to require them to pass general laws for this purpose. *Jones v. Habersham*, 107 U. S. 174.

No grant made by the State for an adequate consideration may be called an "especial privilege," and an institution of the character of appellee certainly renders to the State a consideration to support its charter. *Dartmouth College v. Woodward*, 4 Wheat. 519; *Home of Friendless v. Rouse*, 8 Wall. 430, 437; *State v. Hamline University* (Minn.), 48 N. W. Rep. 1119; *Yale University v. New Haven* (Conn.) 42 Atl. Rep. 87; *Illinois v. Ill. Cent. R. Co.*, 33 Fed. Rep. 730, 769; *Firemen's Fund v. Roome*, 93 N. Y. 313.

The maintenance of institutions of learning has ever been considered a public function, and any corporation or association which helps to perform this function renders a public service.

The act of the territorial legislature granting the exemption, not having been disapproved, is valid.

There was conferred upon territorial legislatures the power to legislate upon all rightful subjects of legislation

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not inconsistent with the Constitution and laws of the United States. § 1851, Rev. Stat.; 12 A. & E. Enc. of Law (2d ed.), 272; *St. Paul & Pacific R. Co. v. Frank M. Parcher &c.*, 14 Minnesota, 224, 250; *Clinton v. Englebrecht*, 13 Wall. 446; *Cooley's Const. Lim.* (7th ed.), p. 54, note; *Miners' Bank v. State of Iowa*, 12 How. 1; *Atlantic & Pac. R. Co. v. Lesueur* (Ariz.), 19 Pac. Rep. 157; *Sperling v. Calfee* (Mont.), 19 Pac. Rep. 204; *Baca v. Perez*, 42 Pac. Rep. 162; *Williams v. Bank of Mich.*, 7 Wend. 540; *Clayton v. Utah*, 132 U. S. 632.

Even under the failure of Congress to disapprove, the act of the legislature is the strongest possible evidence of approval by that body.

The act of the legislative assembly of 1883 was an amendment of the preëxisting charter and did not constitute a new charter. *Wallace v. Loomis*, 97 U. S. 146; *Louisville Gas Co. v. Citizens' Gas Co.*, 115 U. S. 683; *Attorney General v. Joy* (Mich.), 20 N. W. Rep. 806; *S. P. R. Co. v. Orton*, 6 Sawyer, 157, 185; *Wells v. O. R. & N. Co.*, 15 Fed. Rep. 561.

The prohibition contained in the act of Congress did not deprive the legislature of the power to alter the preëxisting charter by special law. *Morawetz on Priv. Corp.* (2d ed.), § 12; *Attorney General v. Railroad Companies*, 35 Wisconsin, 425.

The grant of perpetual exemption is based upon a consideration so that it constitutes a contract. *Grand Lodge v. New Orleans*, 166 U. S. 143.

By the amendatory act the scope of the institution was increased from that of a seminary to a college. This enlarged scope, on account of which large contributions are alleged to have been received and the additional obligation undertaken by the amended charter, furnished the consideration for the exemption. *City Railway Co. v. Citizens' R. Co.*, 166 U. S. 557.

The consideration for a grant of an exemption from

taxation to an institution of this character is always to be presumed. *Illinois Central R. R. v. Decatur*, 147 U. S. 201.

The exemption in the charter is not in contravention of the organic act. *Columbia &c. R. R. Co. v. Chilberg*, 6 Washington, 612.

MR. CHIEF JUSTICE WHITE delivered the opinion of the court.

On December 20, 1859, the legislature of Washington enacted a private law creating Whitman Seminary in Walla Walla County. By the act eight persons were incorporated under the name of the "President and Trustees of Whitman Seminary." The corporation was given perpetual existence and the incorporators authority to govern its affairs and to name their successors. The right to acquire and hold real estate was conferred, with the duty of devoting all the revenue to the support of an institution of learning, for the education of both sexes, which it was the purpose of the act to have established. The capital stock of the corporation was limited by the sixth section to \$150,000. The act was accepted by the incorporators and the institution for which it provided, the Whitman Seminary, was established in Walla Walla County. After a lapse of twenty-three years, the Seminary, in November, 1883, owned considerable personal and real property, devoted to the purposes of the corporation. In that year and month a special act was passed by the territorial legislature, entitled "An act to amend . . ." the act previously referred to (November 28, 1883, Laws of 1883, p. 399). By this act, in the form of an amendment the original incorporators were incorporated under the name of "The Board of Trustees of Whitman College." The act, section by section, amended the prior act. It gave the trustees power to perpetuate themselves and govern

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the new corporation, which was endowed with perpetual existence. The act, in many respects, enlarged the powers of the old corporation, struck out the sixth section, which contained the limitation of \$150,000 of capital stock, and substituted for it the following: "That the property of said board of trustees of Whitman College, including all income and proceeds shall be used exclusively for the purposes of education, and in consideration of said use, said property, income and proceeds shall not be subject to taxation." The organic law of the Territory, the act of Congress of March 2, 1867, § 1, 14 Stat. 426, c. 150, when this last act was passed, contained the following, now embodied in Rev. Stat., § 1889:

"That the legislative assemblies of the several Territories of the United States shall not, after the passage of this act, grant private charters or especial privileges, but they may, by general incorporation acts, permit persons to associate themselves together as bodies corporate for mining, manufacturing, and other industrial pursuits, or the construction or operation of railroads, wagon-roads, irrigating-ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any benevolent, charitable or scientific association."

Whitman College took over the property and effects of the Seminary. It increased its holdings of real and personal property, the avails of which were all devoted to the purposes of the institution. It was in existence when the territorial government passed out of being and the State of Washington was incorporated into the Union, and it is conceded by both sides in argument that no question which requires to be decided on this record calls for a consideration of any of the events or legislation which were a part of the transition from the territorial form of government to statehood. Up to 1905 it is inferable that no attempt was made to tax the property of Whitman College.

In 1905, however, the assessing officers of the county of Walla Walla, who are the appellants upon this record, acting under the authority of the state taxing law, and, upon the assumption that the property of the corporation was taxable, assessed its real property in the county of Walla Walla not actually and physically used for the purposes of the institution, and taxes were levied on such assessment amounting to \$946.32. The corporation thereupon filed in the Circuit Court of the United States the bill which is now before us. The bill contained no averment of diversity of citizenship, and exclusively invoked the authority of the court below upon the ground of the existence of a perpetual contract right of exemption from taxation created by the sixth section of the act of 1883, and the impairment of such contract by the assessment and levy of the taxes in question.

The bill, as amended by stipulation, averred the existence of the contract, the compliance by the corporation with all its obligations, the acquisition of large amounts of property through contributions and otherwise dedicated to the purposes of the corporation, the detriment and loss which would be occasioned as the result of levying taxes upon the property of the corporation by the county of Walla Walla or otherwise by state authority, the destruction of the right of perpetual exemption not only as to the present but as to all future acquired property of the corporation which would result, and a consequent loss or damage vastly in excess of two thousand dollars. In substance, the prayer was for a decree recognizing and enforcing the contract of perpetual exemption from taxation as to all the property of the corporation, present or prospective, and for an injunction adequate to secure these results.

The defendants by demurrers challenged the jurisdiction of the court and the equity of the bill. After hearing, the court held that it had jurisdiction, that the contract

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declared on had been established and was protected from impairment by the contract clause of the Constitution and therefore the assessment and levy of the taxes complained of were void. As defendants elected not to further plead, a final decree was entered granting the relief prayed in the bill. The appeal now before us was then taken.

The taxing officers of the county of Walla Walla, the defendants below and appellants here, insist that we may not review the merits, because the court below had no jurisdiction over the cause, and therefore we must reverse and remand, with directions to dismiss the bill. This rests upon the proposition that as the tax was below the jurisdictional amount, it afforded no basis for jurisdiction. The sum of the levied tax, it is urged, could not be increased by considering the power of taxation which might be exerted in other taxing districts, or by adding taxes which, if the right to tax existed, might be assessed and levied in future years. This, it is insisted, is not only sustained by reason, but is sanctioned by prior decisions of this court.

Both assumptions are wrong. The first, because it misconceives the character of the relief prayed, which was the enforcement of a contract exemption during the perpetual life of the corporation and as broad as its power to acquire and hold property.

Considering the averments of the bill, the amount and value of the property of the corporation, and the nature and character of the contract of exemption asserted, it cannot be doubted that the value of the thing in issue, the contract right, exceeded in value the jurisdictional amount. Granting that the uncertainties of the future and the shifting ownership of property forbids, in a contest merely over the validity of a tax, adding the sum of future taxes which might be levied to the amount of taxes actually levied for the purpose of jurisdiction, that principle can have no application to a case where the issue

presented is not only the right to collect, but also to levy all future taxes. The admission that the right to tax may be abridged by contract, and that such contract may not be impaired without violating the Constitution, carries with it of necessity the power and the duty to protect the contract right and in the nature of things causes jurisdiction for such purpose to be measured by the value of the right to be protected, and not by the value of some mere isolated element of that right. And the doctrine just cited has been applied in two cases so obviously in principle like this as practically to foreclose the question. The first is *New Orleans v. Citizens' Bank*, 167 U. S. 371. In that case a corporation of the State of Louisiana filed its bill in the Circuit Court to enjoin the collection of all taxes of a particular character against it, on the ground of a contract of exemption protected from impairment by the contract clause of the Constitution. As a means of establishing the existence of the contract exemption relied upon, certain judgments recognizing the existence of the contract exemption and enjoining particular taxes were pleaded as conclusively, by the principle of the thing adjudged, establishing the existence of the alleged contract. It was contended, among other things, that as the controversies in the cases in which judgments had been rendered concerned taxes for only particular years, the thing adjudged arising from the judgments was necessarily restricted to the taxes of the years in controversy and did not extend to future taxes, as they were not and could not have been embraced in the litigation. Deciding that this contention was unsound and deducing the existence of the contract as the result of the proof arising from the thing adjudged, it was pointed out that to deny in a case of contract exempting from taxation the right to a decree co-extensive with the power to tax which the contract restrained would be in and of itself an impairment of the contract, since if judicial power was not adequate to

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control by the thing adjudged the right to a contract exemption and to prevent violations of such right, the power to contract would be of no avail. The second case, *Deposit Bank v. Frankfort*, 191 U. S. 499, came here on error to the Court of Appeals of the State of Kentucky. In the state court a judgment of a Circuit Court of the United States, recognizing the existence of contract exemption from taxation was pleaded as a bar against the enforcement of taxes which were embraced within the contract of exemption. The state court refused to give effect to the pleaded judgment of the Circuit Court of the United States on the ground that as by the settled rule in Kentucky judgments restraining the collection of taxes were limited to the particular taxes referred to and did not extend to taxes for future years, the judgment of the Circuit Court should be so limited, and therefore that judgment was not *res judicata*. In reversing the action of the state court on this subject, this court said (p. 512):

"The vice of this argument consists in assuming that the taxes for specific years were alone involved and covered by the decree of the court. The controversy was as to the force and effect of the Hewitt law as a contract; not for one year but for all years; not for one assessment, but for all assessments of taxes upon certain property of the bank. The contest was over the contract, and the consequent want of power to collect any and all taxes the assessment of which did violence to the contract rights of the bank. The court had jurisdiction of the parties and of the subject-matter of the suit, and it was adjudicated that there was a contract which was entitled to protection against impairment by state legislation within the right guaranteed by the Federal Constitution. This adjudication necessarily included not only the taxes for specific years, but foreclosed the right to collect any taxes concerning which the contract afforded immunity to the bank."

Measuring the contention as to the absence of the jurisdictional sum by the principles thus established, it answers itself, since the argument is equivalent to saying that a subject which is necessarily included in the relief to be granted and is, in the nature of things, concluded by the decree to be rendered is yet excluded from consideration for the purpose of the issues in the cause—that is, may not be taken into account in ascertaining whether there is jurisdiction over the controversy.

We state in the margin the cases principally relied upon to support the contention as to the want of jurisdiction.¹ It would suffice to say of these cases that if they supported the proposition which they are cited to maintain, they have been qualified and restricted by the cases which we have just reviewed. But such result is uncalled for, as an analysis of the cases will show that all of them considered, in the absence of contract, where the right to levy a particular tax was assailed, whether there was authority to make up the jurisdictional amount required, by calling into the consideration the influence which the judgment might have upon different taxes or the power to take in view future illegal taxes upon the theory that they might be levied.

We come to the merits, that is, to determine whether the special act incorporating Whitman College was a private charter within the prohibition of the organic act and therefore void, and, if not, whether the exemption from taxation which it conferred was an "especial privilege" within the prohibition of the organic act and hence beyond the power of the territorial legislature to grant. We thus at once bring face to face the act of 1883 and the

¹ *Holt v. Indiana Manufacturing Co.*, 176 U. S. 68; *Clay Center v. Farmers' L. & T. Co.*, 145 U. S. 224; *New England Mortgage Security Co. v. Gay*, 145 U. S. 123; *Citizens' Bank v. Cannon*, 164 U. S. 319; *Rude v. Westcott*, 130 U. S. 152; *Waller v. Northeastern Railroad Co.*, 147 U. S. 370.

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prohibitions of the organic act dismissing all questions concerning the incorporation of the Territory of Washington into the Union as a State, because, as we have seen, it is conceded that nothing on that subject controls the question here to be decided.

We do not think it necessary to inquire whether the act of 1883, although it be assumed that it virtually called into being a new juridical person endowed with new powers and duties, may be treated, not as the original grant of a private charter, but as simply an amendment of the prior charter, because of the form in which the act of 1883 was couched. This is done, because as the issues for decision will be disposed of by considering the case in the light of the prohibition against "especial privileges," it will become unnecessary to consider the operation of the prohibition against the grant of private charters. We think it clear also that the disjunctive character of the prohibition found in the organic act excludes in reason the possibility of saying, as contended in argument, that the especial privileges provided against were simply intended to prohibit the conferring of such privileges as part and parcel of the granting of the prohibited private charters. To adopt such a view would cause the prohibition against especial privileges to be superfluous, and would be repugnant to the plain intent of the act, as manifested from its language. That intent, we think, was to take away the power to grant the forbidden especial privileges by any form of legislative action, leaving no room, therefore, for the implication that it was the purpose of the organic act to recognize the right to give especial privileges, provided only it was not made a part of the grant of a forbidden private charter. And this also completely serves to dispose of the contention that it was the intention of the prohibition against especial privileges to forbid merely the creation of such privileges as a legislative grant of an exclusive right to ferries, bridges, etc.,

which it is urged was a common form of territorial legislative abuse prior to the adoption, in 1867, of the organic act, and therefore was presumably the evil intended to be reached by the enactment of that act. We say this because, even if it be conceded that such alleged abuses were the generating cause of the insertion in the organic act of the prohibition against especial privileges, that concession affords no ground for the generic prohibition and for saying that it should be only applied to one class of especial privileges to the exclusion of all other such privileges. We must be controlled by the power which the act manifests, not by a consideration of the mere motive which initially energized the bringing of the power into play.

We at once moreover concede, for the sake of the argument, that the exemption from taxation which was conferred was upon a consideration, and therefore rested in contract, and if it was in the power of the territorial government to make, is protected from impairment by the contract clause of the Constitution. With this concession in mind, and before coming to determine whether the exemption was valid, that is, whether, in and by virtue of the prohibition in the organic law forbidding especial privileges, the territorial legislature was incompetent to grant a contract exemption, we briefly advert to the contention made that a broad meaning must be given to the organic act for the purpose, if it can be done, of establishing that there was no limit upon the power of the territorial legislature to exempt. It is conceded that the elementary rule is that exemptions from taxation must be strictly construed. But it is said that this applies only to the contract of alleged exemption, and has no relation to the inquiry whether the legislature had the power to exempt, because full legislative power must be presumed to exist unless there be a plain prohibition to the contrary. While we are of opinion that the contention has

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no direct bearing on the more important proposition here to be decided, we cannot give it, even by silence, our assent, because we consider that it admits, on the one hand, the rule of strict construction and at once denies it upon the other, by improperly restricting the area of its operation. We say this because if, in a particular case, the duty arises of determining whether words of restriction found in the fundamental law are intended to operate a limitation on the legislative power to grant contract exemptions from taxation, the rule of strict construction is just as applicable as it would be to a case where it was applied for the purpose of determining whether the particular terms of an alleged contract did or did not embrace an exemption from taxation. We think the rule of construction is as broad as the subject to which it relates and its operation does not depend upon whether the question is one of limitation of legislative power or of the true interpretation of a contract asserted to be one of exemption.

This brings us to the text of the organic act. That a contract giving perpetual succession to a corporation and endowing it with a perpetual exemption from taxation as to all its property, real and personal, is an "especial privilege," seems to us too clear for anything but statement. We fail to see how any other conclusion can be reached, in view of the fact that the very essence of such a contract is to endow the corporation as to its property forever with the privilege of being exempt from the operation and control of the essential governmental power of taxation and thereafter to cause the corporation and all its property, so far as that subject is concerned, to live under the law of the contract and not under the law of general taxation.

But it is said that while this may be the superficial view, it is not an accurate and legal one, since the word privilege has been construed by this court not to include a

contract of exemption from taxation. The cases relied upon are, *Chesapeake & Ohio Ry. v. Miller*, 114 U. S. 176, and *Phoenix Insurance Co. v. Tennessee*, 161 U. S. 174. Briefly, the subject passed upon in those cases and in others of a similar character was this: Where a corporation enjoyed a right of exemption as to the whole or a part of its property, did such exemption from taxation pass under a foreclosure sale to the purchaser at such sale when by law the rights and privileges of the corporation were transferred by the sale? In other words, the question was whether the transmission of the privileges of the corporation to another embraced the privilege resulting from a contract exemption from taxation. It was held that it did not, upon the theory that a contract exemption from taxation was so exceptional in its nature, that the right to transmit it was not embraced in the general authority to transmit privileges, and therefore the power to transfer must be expressly and specially conferred. These rulings were but an illustration in another form of the duty to which we have previously referred under all circumstances to bring to the consideration of the question whether a contract exemption from taxation exists the rule of strict construction. And of course, when the principle upon which the cases were decided is rightly understood their inappositeness to the case before us is manifest. This must be, unless it can be said that rulings which held that a contract of exemption was a privilege of such character that it could not be transmitted without express authority was a ruling that a contract exemption was no privilege at all.

It is urged that as in this case there was a consideration for the especial privilege granted, the agreement of the incorporators to establish and maintain an institution of learning, therefore the exemption cannot be held to be an especial privilege within the intendment of the organic act, since the privilege so bestowed was conferred not as

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an especial privilege, but as an equivalent for the contract obligations assumed. As we have seen, however, it is the contract of exemption which, in the very nature of things, characterizes the grant as an especial privilege. When this is borne in mind it appears that the proposition is that the feature which gave to the grant the essential characteristic of an especial privilege must be held to cause it not to be of that nature.

The only principal contention remaining unnoticed is the alleged acquiescence of Congress in the grant of exemption resulting from its failure to disapprove the act of 1883. Rev. Stat., § 1850. The foundation, however, upon which that contention rests has been decided to be without merit. *Clayton v. Utah*, 132 U. S. 632, 642.

We have not reviewed the minor considerations which, in various forms of statement, have been pressed in argument concerning the wisdom displayed by the territorial assembly in enacting the act of 1883, and the far-reaching and public benefits which have resulted from the provisions of that act and the possible injury to the public weal to arise from now holding that the contract exemption from taxation which the act granted was beyond the scope of the legislative authority. It suffices to say that whatever may be the cogency of the suggestions thus made, it is obvious that they but invite us into a field of inquiry which lies beyond the line which separates the judicial from the legislative authority, and therefore we may not give heed to them.

The decree of the Circuit Court is reversed and the cause is remanded to the District Court with directions for further proceedings in conformity to this opinion.